Supreme Court, U.S.
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No. 92-2048

In The

Supreme Court of the United States

October Term, 1993

PAT S. HOLLOWAY AND ROBBIE HOLLOWAY,

Petitioners,

v.

JANE H. BROWNING, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Court Of Appeals District Of Texas At Dallas

RESPONDENTS' BRIEF IN OPPOSITION

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f/k/a NCNB Texas National Bank, successor to FDIC, as Receiver for First RepublicBank Dallas, N.A., Successor to InterFirst Bank Dallas, N.A., Individually and as Co-Trustee of the Estate of William W. Browning, Jr., Deceased

NationsBank Corporation (parent)

NationsBank, Texas, Corporation (parent)

NationsBank, Texas Bancorporation, Inc. (parent)

NationsBank Community Development Corp. (subsidiary)

NationsBank Housing Fund Development Corp. (subsidiary)

Browning Oil Corporation, HECI Exploration Company, Inc. and Sterling Pipeline Company have no parent or subsidiary companies. NationsBank Corporation has numerous subsidiaries in other states.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Jane H. Browning, et al.,[1] (the "Brownings") respectfully request that this Court deny the Petition for Writ of Certiorari by Pat S. Holloway ("Holloway") and Robbie Holloway ("Robbie") seeking review of the judgment of the Texas Court of Appeals for the Fifth Court of Appeals District in Dallas. That court's opinion in this case is reported at 840 S.W.2d 14.

JURISDICTION

The Court should decline to accept jurisdiction to review the judgment of the Texas court of appeals because the issues sought to be presented here were not timely and properly presented below.

STATEMENT OF THE CASE

The petition of Holloway and Robbie (collectively, the "Holloways") is a companion to the petition filed by Flojo Trading Corporation ("Flojo") in Cause No. 92-2049, *Flojo Trading Corp. v. Jane H. Browning, et al.*

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[1] The Respondents are Jane H. Browning, Individually, as Co-Independent Executrix and as Co-Trustee of the Estate of William W. Browning, Jr.; Michael G. Starnes, Individually, as Co-Independent Executor and as Co-Trustee of the Estate of William W. Browning, Jr., as Co-Trustee of the Browning Children's Trusts, and as Special Trustee; Catherine Agnes Land Starnes; Kathryn Louise Browning Cook; Averille Adams Browning Dawson; William Webb Browning, III; Winifred Fallon Browning Vaughn; Robert Holland Browning; and NationsBank of Texas, N.A., f/k/a NCNB Texas National Bank, Successor to FDIC, as Receiver for First RepublicBank Dallas, N.A., Successor to InterFirst Bank Dallas, N.A., Individually and as Co-Trustee of the Estate of William W. Browning, Jr., Deceased.

The Holloways' petition combined with Flojo's petition is their last gasp after 14 years of litigation with the Brownings. Over 15 separate but interrelated proceedings (lawsuits or original proceedings) have been filed, involving 16 separate appeals. This is the fourth time Holloway has sought to present essentially the same questions to this Court. Portions of the history of this litigation are reported in the opinions cited in the footnote.[2]

Due to the complex, lengthy history of this litigation, only an extremely abbreviated synopsis of the most important aspects can be provided. A flow chart is

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[2] *Flojo Trading Corp. v. Browning*, No. 3-91-256-CV (Tex. App. July 1, 1992) (unpublished); *Holloway v. Starnes*, 840 S.W.2d 14 (Tex. App. 1992, writ denied); *Starnes v. Holloway*, 779 S.W.2d 86 (Tex. App. 1989, writ denied); *Browning v. Ryan*, 756 S.W.2d 379 (Tex. App. 1988) (orig. proceeding), *rev'd*, *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680 (Tex. 1989); *Jaehne v. Starnes*, No. 14,693 (Tex. App. Sept. 23, 1987) (unpublished); *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985); *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. 1984), *dism'l reinstated*, 690 S.W.2d 321 (Tex. App. 1985, writ ref'd n.r.e.) (*en banc*), *cert. denied*, 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602 (1986); *Holloway v. Navarro*, No. 91-1541 (5th Cir. Jan. 3, 1992) (unpublished); *Browning v. Navarro*, 923 F.2d 377 (5th Cir. 1991) (*Browning v. Navarro IV*); *Browning v. Navarro*, 887 F.2d 553 (5th Cir. 1989) (*Browning v. Navarro III*), *reh'g denied*, 894 F.2d 99 (5th Cir. 1990); *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987) (*Browning v. Navarro II*); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984) (*Browning v. Navarro I*), *rev'g Browning v. Navarro*, 37 B.R. 201 (N.D. Tex. 1983); *Holloway v. Walker*, 784 F.2d 1287 (5th Cir.), *reh'g denied*, 790 F.2d 1170, *cert. denied*, 479 U.S. 984, 107 S.Ct. 571, 93 L.Ed.2d 576 (1986); *Holloway v. Walker*, 800 F.2d 479 (5th Cir. 1986) (Bolivian consul matter); *Holloway v. Walker*, 811 F.2d 263 (5th Cir. 1987) (sanctions).

provided in Appendix A at 1a-4a to assist the Court in relating the various proceedings to each other.

This litigation began in 1979 when the Brownings sued Holloway, Robbie, Humble Exploration Company, Inc. ("Humble," now known as HECI Exploration Co.), and others for fraud and breach of fiduciary duty obligations (the "1979 Case"). (App. A at 1a & 4a, see A.1; the 1979 Case is identified on the flow chart by the letter "A.") Holloway filed bankruptcy proceedings for Humble, Robbie and himself and removed the 1979 Case to the bankruptcy court. (App. A at 1a & 4a, see B.1; Holloway's bankruptcy proceeding is identified on the flow chart by the letter "B.") The bankruptcy court subsequently remanded the case to the state court but retained jurisdiction for enforcement of any resulting judgment. Ultimately, after a lengthy jury trial, the Brownings obtained a judgment (the "1982 Judgment") awarding them damages, constructive trusts or both against Holloway, Robbie and Holloway's alter egos – Humble, Sterling, Holloway Exploration Corp. and Flojo. (App. A at 1a & 4a, see A.2.) All the parties against whom the 1982 Judgment issued appealed. (App. A at 1a & 4a, see A.3.)

Even prior to appealing the 1979 Case, Holloway, Humble and others also attacked the 1982 Judgment by filing in federal court a civil rights suit, *Holloway v. Walker*. (App. A at 1a & 4a, see C.1; *Holloway v. Walker* is identified on the flow chart by the letter "C.") In *Holloway v. Walker*, Holloway alleged that Judge Walker had corruptly conspired with the Brownings, their attorneys and others to deny the defendants in the 1979 Case a fair trial to obtain control of their property. Holloway sought damages under 42 U.S.C. § 1983 and a declaratory judgment holding the 1982 Judgment void for denying them due process under the Fourteenth Amendment. They also

alleged pendent state law claims of wrongful receivership and negligence and malfeasance by the receiver.

Holloway also converted his bankruptcy to a liquidation proceeding. (App. A at 1a & 4a, see B.2.) Don Navarro was appointed trustee of Holloway's bankruptcy estate and Humble's bankruptcy estate. Because no supersedeas bond was filed, the Brownings filed *Browning v. Navarro* in the federal district court under its bankruptcy jurisdiction to enforce the constructive trust portions of the 1982 Judgment. (App. A at 2a & 4a, see D.1; *Browning v. Navarro* is identified on the flow chart by the letter "D.") In response, Holloway, Robbie, Navarro, Humble and Sterling all challenged the 1982 Judgment as void. The federal district court held that the 1982 Judgment was void because Judge Walker lacked jurisdiction under the bankruptcy court's remand order. *Browning v. Navarro*, 37 B.R. at 210. (App. A at 2a & 4a, see D.2.)

The Brownings moved to dismiss the appeal in the 1979 Case due to the appellants' inconsistent claims in the federal court; the appellants requested that the appeal be abated until the Fifth Circuit's decision. In *Humble Exploration Co. v. Browning*, 677 S.W.2d at 113, the court of appeals held that the appellate record showed that the appellants had not objected to Judge Walker's trying the case on any alleged restrictions from the bankruptcy court. It found that the appellants had gambled on the verdict in the trial before Judge Walker and then having lost, pursued their appeal, while at the same time advancing their "leash"[3] theory in the federal courts. *Id.* at

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[3] In oral argument, appellants' counsel told the court of appeals that the bankruptcy court's remand order was like "a 'remand on a leash' whereby the Bankruptcy Court could, at any time, grasp the leash and return the dispute to that court regardless of its status in the state system." 677 S.W.2d at 113, n.3.

113-14. The court of appeals held that the appellants had trifled with the state courts and dismissed their appeal. *Id.* at 114-15. (App. A at 1a & 4a, see A.4.)

A few months later the Fifth Circuit reversed the federal district court's judgment, holding that Judge Walker had jurisdiction in the 1979 Case and that the 1982 Judgment was not void. *Browning v. Navarro I*, 743 F.2d at 1086. (App. A at 2a & 4a, see D.3.)

Following *Browning v. Navarro I*, the state appellants filed in the court of appeals their "Motion to Withdraw Judgment Granting Appellees' Motion to Dismiss." The court of appeals initially granted the motion *ex parte*. Five months later the *en banc* court reinstated the dismissal, holding that the appellants' motion had been wrongfully and purposely denominated to obtain a second motion for rehearing in violation of the Texas rules. *Humble Exploration Co. v. Browning*, 690 S.W.2d at 323, 328. Both the Texas Supreme Court and this Court refused to review the case. (App. A at 1a & 4a, see A.6-9.) *Humble Exploration Co. v. Browning*, 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602, *reh'g denied*, 475 U.S. 1151, 106 S.Ct. 1807, 90 L.Ed.2d 351 (1986).

Meanwhile, on March 28, 1985 the federal district court granted the Brownings a partial summary judgment in *Holloway v. Walker*, holding that there was no evidence that the Brownings had conspired to deprive Holloway and the others of a fair trial in the 1979 Case. Several weeks later it held that Holloway had not been denied due process in the 1979 Case and dismissed the federal claims with prejudice. (App. A at 1a & 4a, see C.2.) It also dismissed without prejudice Holloway's pendent state negligent and wrongful receivership claims.

Following the dismissal of *Holloway v. Walker*, Holloway and Navarro refiled in the state district courts of Lee

County, Texas the state negligent and wrongful receivership claims in *Navarro v. Starnes*. (App. A at 2a & 4a, see G.1; *Navarro v. Starnes* is identified on the flow chart by the letter "G.")

Concurrently, the federal district court rejected Holloway's and Navarro's further attacks on the 1982 Judgment in *Browning v. Navarro I* and granted the Brownings immediate possession of the constructive trust property. (App. A at 2a & 4a, see D.4.) The federal courts issued a series of orders requiring Navarro, Holloway and Robbie to turn over constructive trust properties to Michael G. Starnes, as Special Trustee.

Attempting to block the federal court's enforcement orders, the appellants in the 1979 Case unsuccessfully sought extraordinary writs in the Texas appellate courts to prohibit enforcement of the 1982 Judgment. When those efforts failed, Holloway (without Navarro's approval), Flojo and other cohorts filed *Jaehne v. Starnes*, another collateral attack on the 1982 Judgment in the district courts of Lee County, Texas just minutes after filing *Navarro v. Starnes*. (App. A at 2a & 4a, see H.1; *Jaehne v. Starnes* and its companion case, *Holloway v. Browning* are identified on the flow chart by the letter "H.") Holloway obtained an *ex parte* temporary restraining order and multiple extensions prohibiting compliance with the federal district court's orders in *Browning v. Navarro*. Because Holloway had not obtained his approval, Navarro removed *Jaehne v. Starnes* to the bankruptcy courts. Holloway immediately refiled the collateral attack in the same court as *Marcy Holloway, et al. v. Jane H. Browning, et al.* (The Lee County collateral attacks were generally treated together and were eventually consolidated.)

When the Lee County collateral attacks were removed to the bankruptcy court, the federal district

court found that Holloway and his cohorts – some of whom were not parties to either the 1979 Case or *Browning v. Navarro* – had included numerous claims not within the ambit of *Browning v. Navarro*.[4] The court noted that such parties were claiming that they had superior title to property purportedly subject to the Brownings' constructive trust. The federal district court held that its order did decide superiorities of title between the parties to *Browning v. Navarro* and third persons. It further held that Holloway could dispute whether certain property came within the ambit of the constructive trusts ***"for reasons other than the validity of the state court judgment. . . ."*** (Holloway App. ("H.App.") I at 57a, emphasis added.) Accordingly, the federal district court abstained from resolving conflicting claims to title to assets subject to a constructive trust by the 1982 Judgment for reasons not involved in *Browning v. Navarro*. (*Id.* at 57a-58a.) The Lee County collateral attack cases were remanded to Texas courts.[5]

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[4] Holloway and his cohorts added a number of other claims such as libel, slander, and malicious prosecution to their collateral attacks in *Jaehne v. Starnes*.

[5] After the Lee County collateral attacks were remanded to the state courts, Judge Placke, who had issued the serial temporary restraining orders for Holloway, signed an order holding the 1982 Judgment void for an alleged litany of reasons. (App. A at 2a & 4a, see H.2.) The Texas Supreme Court stayed that order in an original mandamus proceeding, *Browning v. Placke* (which is identified on the flow chart by the letter "I"; App. A at 3a & 4a, see I.1). The Texas Supreme Court later held that the record did not show that the 1982 Judgment was void and issued a conditional writ of mandamus. *Browning v. Placke*, 698 S.W.2d at 363. (App. A at 3a & 4a, see I.2.)

Ultimately Holloway and his family nonsuited their attacks on the 1982 Judgment and many of their other claims in *Jaehne v. Starnes*. The Lee County district court granted the Brownings a

In compliance with the federal district court's orders, Navarro transferred to the Special Trustee title to various oil and gas interests and real property. Holloway, however, refused to vacate the Lee County Farm, one of the properties transferred to the Brownings. As a result, on December 23, 1985 the federal district court ordered Holloway and all those acting in concert with him to vacate the Lee County Farm. Holloway reported that he had moved off the farm but that his wife and daughters had not moved. Holloway then prepared and had filed in his *Holloway v. Walker* appeal an Emergency Application purportedly on behalf of his wife and daughters seeking a stay of the order requiring him to vacate the farm. (App. A at 1a & 4a, see C.3.) This ancillary application again attacked the 1982 Judgment as void and also threatened armed resistance to the Brownings' efforts to obtain possession of the farm. The Fifth Circuit denied the application on March 17, 1986. (App. A at 1a & 4a, see C.4.)

Two days later the Fifth Circuit affirmed the *Holloway v. Walker* judgment holding that the defendants in the 1979 Case had an adequate remedy in their direct appeal for alleged conspiracy between the Brownings, Judge Walker and others to deny them a fair trial in the 1979 Case. *Holloway v. Walker*, 784 F.2d at 1292. (App. A at 1a & 4a, see C.5.) The Fifth Circuit rejected Holloway's argument that the dismissal of the direct appeal denied an adequate post-judgment remedy. It specifically noted:

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summary judgment in April, 1991 on the remaining collateral attack on the 1982 Judgment by Flojo and the Jaehnes. (App. A at 3a & 4a, see H.7 & 8.) The Austin Court of Appeals affirmed that judgment on July 1, 1992; no further appeal was taken. (App. A at 3a & 4a, see H.10.) In the severed proceedings the district court granted the Brownings judgment against Holloway's remaining claims in January, 1992. (App. A at 4a, see H.9.) Holloway did not appeal.

> Plaintiffs' rights of state court review were lost by a unique, complex mix of events (which plaintiffs played a major part in creating).

784 F.2d at 1294. Holloway sought a writ of certiorari, which this Court denied. *Holloway v. Walker*, 479 U.S. 984, 107 S.Ct. 571, 93 L.Ed.2d 576 (1986). (App. A at 2a & 4a, see C.7.)

Meanwhile, on March 11, 1986 the federal district court, in *Browning v. Navarro*, held Holloway in contempt of court for moving back onto the Lee County Farm.[6] Holloway filed a petition for *habeas corpus* with the Fifth Circuit, again attacking the validity of the 1982 Judgment. (App. A at 2a & 4a, see E.1; the *habeas corpus* proceeding is identified on the flow chart by the letter "E.") He alleged that the 1982 Judgment was void because Judge Walker was biased, corrupt, had a personal interest in the case, and was represented by counsel against Holloway. He further alleged that Judge Walker imposed an illegal receivership on Humble to pay his own attorney. The Fifth Circuit denied the application. (App. A at 2a & 4a, see E.2.)

Undaunted by the numerous adverse decisions in the preceding several months, Holloway incorporated the same allegations and added new ones in three virtually identical attacks on the 1982 Judgment. The first was the Defendants' Motion for Summary Judgment and Declaratory Judgment in *Browning v. Navarro*. (App. A at 2a & 4a, see D.5.) The federal district court rejected Holloway's claims as no longer before it and issued a judgment disposing of the remaining issues in *Browning v. Navarro*. (App. A at 2a & 4a, see D.6.) Holloway, but not Robbie, appealed.

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[6] Prior to the contempt hearing, Holloway's wife and daughters vacated the Lee County Farm.

The very next week Holloway re-asserted the same claims in the bankruptcy court in objections to the Brownings' monetary claims against his bankruptcy estate. (App. A at 1a & 4a, see B.3.) Following a hearing, the bankruptcy court allowed the Brownings an unsecured claim of $72 million based on the 1982 Judgment and denied all of Holloway's objections to their claims. (App. A at 1a & 4a, see B.4.) Holloway appealed the bankruptcy court's order to the district court. (App. A at 1a & 4a, see B.5.)

A few weeks later, Holloway initiated the third, virtually identical, attack by filing this case. (App. A at 3a & 4a, see J.1; *Holloway v. Starnes* is identified on the flow chart by the letter "J.") Table I on page 11 compares Holloway's allegations in this case to the ones he made in *Browning v. Navarro* and in the bankruptcy case. The table compares the amended petition filed by Holloway on May 21, 1990, which was the most recent petition at the time the Brownings filed their Amended Motion for Summary Judgment.[7]

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[7] In the original petition, Holloway included an additional allegation that the Texas courts lacked jurisdiction over him because he had diplomatic immunity as a consul for the Republic of Bolivia. He had previously asserted the same claim in both the Lee County court and the federal courts. The federal courts rejected Holloway's contention, finding it to be both factually and legally lacking in merit. *Holloway v. Walker*, 800 F.2d 479 (5th Cir. 1986). When the then sitting judge recused herself from this case, Holloway filed an amended petition, replacing his Bolivian consul argument with his claim that Judge Walker lacked jurisdiction because a previously appointed, retired judge had personal, exclusive jurisdiction over the case. Judge Ryan, a retired judge himself, granted Holloway a summary judgment on that issue while refusing to hear the Brownings' previously filed motion for summary judgment. (App. A at 3a & 4a, see J.2.) The Texas appellate courts reversed Judge Ryan's judgment and

TABLE I
COMPARISON OF HOLLOWAY'S CLAIMS IN MULTIPLE PROCEEDINGS

Holloway v. Starnes 1st Amd. Pet.		Browning v. Navarro May '86 MSJ	Bankruptcy Proceedings Obj. to Brownings' Claims
Para. No.	Allegation	Para. No.	Para. No.
1	Rule 301	14	5
2	Flojo Argument	17	6
3	Res Judicata	–	–
4	Stare decisis	–	–
5	Counsel in Case	10	15
6	Judge "Interested"	7 & 8	12 & 13
7	Judge Biased	6	11
8	Conspiracy	5	10
9	Appeal Dismissal	2	8
10	Supremacy Clause*	3	7
11	Denial of Jury and Due Process	4	14
12	Violation of State Statutes	11	16
13	Denied Access to Court	4	9
14	Unconstitutional Supersedeas	9	14
15	Fraud and Conspiracy	5 & 6	10 & 11
16	Penal Code	5-8	10-13
17	Unconstitutional	passim	10-13

* Holloway alleged the 1982 Judgment was obtained in violation of the bankruptcy court's order, and therefore the Supremacy Clause prohibits enforcement of the 1982 Judgment.

In Holloway's *Browning v. Navarro* appeal, the Fifth Circuit rejected all of his attacks on the 1982 Judgment except one. It held that Holloway could attack the 1982 Judgment as being procured by a fraud upon the court through a conspiracy between Judge Walker, the Brownings, their attorneys, and others. The Fifth Circuit cautioned, however, that Holloway's fraud claims could be barred by *res judicata*. *Browning v. Navarro II*, 826 F.2d at 346. (App. A at 2a & 4a, see D.7.) It held that if, on remand, Holloway proved fraud upon the court and *res judicata* did not bar his claim, the federal district court had the equitable power to set aside the entire 1982 Judgment, including the jury verdict. *Id.*

On remand the Brownings moved for summary judgment on the basis of *res judicata*. The federal district court vacillated but finally held that *res judicata* did not apply. It also denied Holloway's motion for summary judgment because fact questions existed. In addition it stayed Holloway's appeal from the bankruptcy court until *Browning v. Navarro* could be decided. (App. A at 1a & 4a, see B.6.)

The Brownings filed an interlocutory appeal to the Fifth Circuit. The Fifth Circuit held that *res judicata* barred any further attack on the 1982 Judgment for allegedly being obtained by a fraud upon the court through a conspiracy between Judge Walker, the Brownings, and their attorneys. *Browning v. Navarro III*, 887 F.2d at 558-62. Holloway also appealed, claiming that the 1982 Judgment was obtained by fraud, was in violation of the "clean-hands" doctrine and had been replaced by a subsequent judgment under the "last-in-time" rule. *Id.* at 556, 562-63.

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remanded the case. *Starnes v. Holloway*, 779 S.W.2d at 97-98. (App. A at 3a & 4a, see J.3 & 4.) Following remand, Holloway deleted that claim in the amended petition he filed on May 21, 1990.

The Fifth Circuit rejected all of Holloway's contentions and granted summary judgment for the Brownings. *Id.* at 564. (App. A at 2a & 4a, see D.8.)

When the Fifth Circuit ruled against Holloway in *Browning v. Navarro III*, Robbie, who had filed a separate appellee's brief against the Brownings, filed a motion for rehearing seeking to pursue Holloway's claims that the 1982 Judgment was fraudulently obtained by conspiracy. The Fifth Circuit denied Robbie's motion for rehearing, holding that she was bound by the May 23, 1986 revised final judgment, which she had not appealed. *Browning v. Navarro III* (rehearing), 894 F.2d at 100. (App. A at 2a & 4a, see D.9.)

On remand from *Browning v. Navarro III*, the federal district court issued its judgment holding that the 1982 Judgment " . . . is a valid and enforceable judgment." Because the court found that the Holloways had engaged in repetitious and frivolous litigation, it also enjoined them and all persons acting in concert with them from making any further attacks on the 1982 Judgment in the courts of the United States and from:

> attempting to relitigate [in any court] any claim . . . which [was] or could have been asserted in *Holloway v. Walker* (other than the pendent state claim action therein which was dismissed without prejudice), or in *Browning v. Navarro*. . . .

(App. A at 2a & 4a, see D.10.)

Holloway appealed yet again. A few weeks after the Texas district court granted the summary judgment in this case, the Fifth Circuit affirmed the federal district court's judgment. *Browning v. Navarro IV*, 923 F.2d at 377. (App. A at 2a & 4a, see D.11.)

After *Browning v. Navarro IV*, the federal district court, acting in its bankruptcy appellate role, affirmed the bankruptcy court's August 7, 1986 order allowing the

Brownings' claim and overruling all of Holloway's objections. (App. A at 1a & 4a, see B.7.) Holloway appealed that order to the Fifth Circuit. The Fifth Circuit affirmed and gave Holloway a final warning against further pursuit of his claims in the federal courts. *Holloway v. Navarro*, No. 91-1541 (5th Cir. 1992) (unpublished opinion), result published in table at 952 F.2d 399. (App. A at 1a & 4a, see B.8 & 9.)

The Brownings moved for summary judgment in this Case. Their major grounds against Holloway and Robbie were that their collateral attack was controlled by the recitations in the 1982 Judgment, that their bill of review was barred by the dismissal of the direct appeal, and that all their claims were barred by *res judicata*. The Texas district court granted the Brownings summary judgment without specifying the grounds. It also denied Holloway's motions for summary judgment, and enjoined Holloway, Robbie and those acting in concert with them from relitigating their attacks on the 1982 Judgment in the state courts.[8] (App. A at 3a & 4a, see J.5.)

The Holloways and Flojo appealed to the Dallas Court of Appeals. That court noted that the Holloways had not assigned any error to the dismissal of their collateral attack. It affirmed the judgment for the Brownings against the Holloways on the grounds of *res judicata*. It did not address the impact of the dismissal of the prior appeal. *Holloway v. Starnes*, 840 S.W.2d at 21-22.[9] (App. A

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[8] Although Holloway had previously filed eleven undecided motions for summary judgment, only one, his Amended Third Motion for Summary Judgment, was brought to the attention of the judge assigned to the case following remand.

[9] The Dallas Court of Appeals also addressed the Holloways' third motion for summary judgment. It held that even if the trial court had erroneously included Flojo in the 1982

at 3a & 4a, see J.6.) The Texas Superme Court denied review. (App. A at 3a & 4a, see J.7 & 8.)

REASONS FOR DENYING THE WRIT

I. Petitioners Did Not Properly Preserve the Federal Questions Sought to be Reviewed.

A. The Holloways Did Not Preserve Question No. 1 for Review.

The gist of the Holloways' first question presented for review is whether they were denied due process under the Fourteenth Amendment by an alleged conspiracy between Judge Walker, the Brownings and their attorneys in the original 1979 case to deny them a fair trial.

The Holloways claim that this question is raised by Holloway's first and sixth motions for summary judgment filed in 1986, which Robbie claims to have adopted. In fact, Holloway raised in the trial court only a part of the issue he presents here. His first motion for summary judgment claimed that Judge Walker's alleged interest in the case, acting as counsel for the Brownings, and bias or appearance of bias violated the due process provisions of the Texas Constitution but not the Fourteenth Amendment. (App. B at 5a-8a.) Holloway's Sixth Motion for Partial Summary Judgment claimed that Judge Walker allegedly acted as the Brownings' counsel, thereby violating the Due Process Clause of the Fourteenth Amendment. (App. C at 9a-10a.)

Neither of those motions was filed on Robbie's behalf. (App. B at 5a, App. C at 9a.) Contrary to the

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Judgment, such would not require reversal of that judgment against Holloway or Robbie. 840 S.W.2d at 24. Holloway and Robbie do not present a question on that matter for this Court's review.

Holloways' assertion, the index of the appellate record does not show that Robbie ever adopted either. (App. C at 13a-16a.) Therefore, she cannot rely on either motion to seek an affirmative judgment for her. *Central Education Agency v. Burke*, 711 S.W.2d 7, 8 (Tex. 1986); *Teer v. Duddlesten*, 664 S.W.2d 702, 703 (Tex. 1984).

Following the remand of this case by the court of appeals in 1990, Holloway filed Plaintiffs' Second Amended Original Petition, which alleged a "deprivation of due process under the Texas Constitution" but not the Fourteenth Amendment. In Texas practice an amended petition supersedes and supplants the instrument amended. *Johnson v. Coca-Cola Co.*, 727 S.W.2d 756, 758 (Tex. App. 1987, writ ref'd n.r.e.). The omission of a claim in an amended pleading is deemed an abandonment. *See Gage v. Langford*, 615 S.W.2d 934, 940 (Tex. Civ. App. 1981, writ ref'd n.r.e.).

In addition, Holloway did not argue any violation of the Fourteenth Amendment in his brief to the Texas court of appeals while arguing his assignments of error on the trial court's denying his first and sixth motions for summary judgment. (App. E at 24a-29a.) Texas procedure requires appropriate argument and authorities be presented to support each assignment of error. *Trinity Universal Ins. Co. v. Fidelity & Casualty Co. of N.Y.*, 837 S.W.2d 202, 205 (Tex. App. 1992, no writ). Finally, Holloway did not assign in his motion for rehearing to the court of appeals any error to that court's rejection of his assignments concerning his first and sixth motions for summary judgment. (App. G at 39a.) Under Texas procedure, a party cannot subsequently attack a ruling of a court of appeals which the party did not assign as error in a motion for rehearing to the court of appeals. *Albright v. City of Houston*, 677 S.W.2d 487, 488 (Tex. 1984).

B. The Petitioners Did Not Preserve Questions Nos. 2 and 3 for Review.

The Holloways' second and third points contend that the Texas courts somehow violated the Supremacy Clause by holding that their claims in this suit are barred by federal *res judicata* because the federal district court had dismissed without prejudice Holloway's pendent state law claims in *Holloway v. Walker* and had abstained in favor of the state courts in *Browning v. Navarro.*

The Holloways did not argue in their briefs to the Texas court of appeals that the trial court's granting summary judgment for the Brownings on *res judicata* grounds violated the Supremacy Clause of the United States Constitution. (App. E at 19a-23a and App. F at 34a-36a.) In fact, Robbie raised the Supremacy Clause for the first time in her reply brief to the Texas Supreme Court (App. J at 71a); Holloway raised it for the first time in his petition to this Court. (See App. G, H, I & K.) If the Supremacy Clause were an issue in this case, it would have been an issue when the trial court was addressing the Brownings' motion for summary judgment. Texas law requires a party to present an issue first to the lower courts for their decision in order to preserve it for appeal. Tex. R. App. P. 52(a); *San Jacinto River Auth. v. Duke,* 783 S.W.2d 209, 210 (Tex. 1990).

The Holloways failed to preserve any of their three questions for this Court's review. Rule 14.1(h), Supreme Court Rules.

II. The Court of Appeals Has Not Decided a Federal Question in Conflict with Decisions of this Court.

The Holloways cite various decisions of this Court that a decision without prejudice or an abstention is not a decision on the merits. Then they argue that the Texas

court of appeals acted contrary to these rulings by affirming the summary judgment in favor of the Brownings' grounds on federal *res judicata* grounds.

The Holloways mischaracterize the court of appeals' decision. Nowhere in its opinion did the court of appeals intimate that a dismissal without prejudice or an abstention was a decision on the merits. It merely decided that the issues presented by the Holloways in this suit were or could have been decided in either *Holloway v. Walker*, *Browning v. Navarro*, or Holloway's bankruptcy case.

The resolution of such a question has to be made by the courts in the subsequent cases. The court that resolves the first case does not know what issues will arise in subsequent cases. In fact, the Fifth Circuit in *Browning v. Navarro IV*, stated that the principles of claim and issue preclusion may bar particular claims or issues sought to be raised in the Holloway bill of review.

> Trusting in the state courts' competence, we leave to them the application of these principles and the decision whether our holdings in the many related cases involving these parties and this state court judgment bar any or all of the claims or issues raised in Mr. Holloway's pending state equitable bill of review.

923 F.2d at 377. The state courts' decisions applying those principles did not violate the Supremacy Clause or conflict with any decisions of this Court regarding federal *res judicata*.

III. The Holloways' Arguments Are Inconsistent.

The Holloways argue that the Texas courts violated the Supremacy Clause by barring their state law claims on the grounds of *res judicata*. Simultaneously they ask this Court to grant them judgment that the proceedings in the 1979 Case violated their due process rights under the

Fourteenth Amendment. In short, they urge federal claims on the merits while asserting that they are being denied a decision on state law claims.

The Holloways' due process issue here is the same issue Holloway asserted in *Holloway v. Walker* and in *Browning v. Navarro*. Both cases were decided adversely to Holloway on the merits. Variations of the same issue were submitted in Holloway's petition for certiorari in *Holloway v. Walker* (App. L at 77a-78a) and in the Holloways' petition for certiorari in the 1979 Case. (App. M at 80a.)

The Holloways quote out of context from *Browning v. Navarro II* to suggest that the Fifth Circuit has ruled that they were denied due process. They steadfastly ignore the Fifth Circuit's subsequent pronouncements in 1989 about this litigation.

> Plenty of process has been provided to the parties of this dispute. It is fair to say that seldom have so many judgments decided so little. We must decide whether any process is still due. We conclude that the litigants have had their day in court and that it is time to end this dispute.

Browning v. Navarro III, 887 F.2d at 554.

IV. The Holloways Impermissibly Ask This Court to Interpret Texas Law.

A bill of review[10] in Texas is an equitable procedure to set aside a prior judgment. It may not be used as a substitute for a direct appeal. *Clements v. Chajkowski*, 146 Tex. 408, 208 S.W.2d 841, 843 (1948). To obtain a bill of review in Texas a party must allege and prove: (1) a

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[10] The Holloways did not appeal the trial court's summary judgment on his collateral attack. *Holloway v. Starnes*, 840 S.W.2d at 18.

meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making by the fraud, accident or wrongful act of the opposite party, (3) unmixed with any fault of his own. *Petro-Chemical Transport, Inc. v. Carroll,* 514 S.W.2d 240, 243 (Tex. 1974).

In his appeal to the court of appeals, Holloway claimed that he was prevented from presenting his meritorious defenses at the trial of the 1979 Case by: (1) Judge Walker's alleged bias, fraud and conspiracy with the Brownings, their attorneys and others; and (2) Judge Walker's various unconstitutional and illegal rulings. 840 S.W.2d at 21. The court of appeals noted that Holloway had made or could have made the same factual allegations in the prior federal cases and this case "for one purpose – to have the [1982 Judgment] set aside as void or voidable." *Id.*

In *Browning v. Navarro* the Fifth Circuit held that Holloway could have the 1982 Judgment set aside by the federal courts if he showed that judgment was the result of collusion that (1) was designed to corruptly influence the proceedings or to inhibit the ability of an adverse party to fully present his defense, and (2) had the effect of foreclosing to him the opportunity to have a fair and complete trial. *Browning v. Navarro II,* 826 F.2d at 345; *Holloway v. Starnes,* 840 S.W.2d at 20. Holloway lost on the merits in *Browning v. Navarro* because his claims were barred by *res judicata* as a result of the prior judgment in *Holloway v. Walker. Browning v. Navarro III,* 887 F.2d at 558-62.

The court of appeals held that a party should not be permitted to relitigate in a Texas equitable bill of review the same fraud claims that he made unsuccessfully in prior attacks on the same judgment. 840 S.W.2d at 21. Robbie was likewise barred by *res judicata* because she

could have presented the same claims in *Browning v. Navarro*. (Robbie attempted to evade *res judicata* on the grounds that she had not appealed from the federal district court's judgment in May, 1986 and therefore was not bound by the rulings in *Browning v. Navarro II*, *Browning v. Navarro III* or *Browning v. Navarro IV*.) *Res judicata* bars claims that could have been decided, as well as those that were decided. 840 S.W.2d at 22; *Browning v. Navarro IV*, 923 F.2d at 377.

What a Texas court will consider to prove the second element of a Texas equitable bill of review is a matter of Texas law. The court of appeals' decision is evidently consistent with Texas jurisprudence because the Texas Supreme Court denied review. The Holloways essentialy ask this Court to tell the Texas courts what issues they should hear to support a unique Texas review procedure. Such action is not within the jurisdiction of this Court. 28 U.S.C. § 1257(a).[11]

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[11] The Holloways also, in essence, ask this Court to force the Texas courts to relitigate their claims of a violation of the due course of law provision of the Texas Constitution, because such provisions allegedly afford greater rights and impose higher standards than the Fourteenth Amendment. The Holloways' Texas constitutional claim was not the issue required to obtain a bill of review. They attempt to change the focus from the issues before the court of appeals. Moreover, their argument is erroneous. The Holloways fail to inform the Court that the Texas Constitution has two due course of law provisions, which provide separate due process and open court guarantees. *Nelson v. Krusen*, 678 S.W.2d 918, 921 (Tex. 1984). None of the four cases cited by the Holloways establish that the due process provision of the Texas Constitution, Article I, § 19, would provide greater due process rights in the 1979 Case than does the Fourteenth Amendment. *Nelson v. Krusen*, 678 S.W.2d at 921; *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983) and *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986) all address a separate issue of whether

V. The Federal Courts Did Not Leave Holloway's Claims for State Court Resolution.

Holloway's central argument in the Texas courts was that the federal court did not have jurisdiction to decide the bill of review claims because a bill of review had to be brought in the court that tried the original case. Robbie's main argument was that she was bound only by *Browning v. Navarro I*. When those arguments failed, they switched their arguments to variations of the ones presented here – that the federal courts preserved the Holloways' claims for state court review. They distort the actual proceedings in the federal courts.

Holloway's pendent state claims in *Holloway v. Walker* were for wrongful receivership in violation of certain Texas statutes and for negligence and malfeasance by the receiver. Holloway also sought a declaratory judgment that the 1982 Judgment was void for various reasons including the allegation that the civil rights defendants had deprived him of his constitutional rights to due process and a fair trial. The only reference to due process in the Plaintiffs' First Amended Complaint, however, was

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various legislative restrictions on litigants violate the Texas open courts provision, Article I, § 13 of the Texas Constitution. The fourth cite by the Holloways was to a concurring opinion by a justice of the Texas Supreme Court addressing a Texas procedural rule added five years after the trial in the 1979 Case. *Sun Exploration and Production Co. v. Jackson*, 783 S.W.2d 202, 205 (Tex. 1989) (Spears, J., concurring). (One justice joined in his opinion; two others disagreed in a separate concurring opinion; and the remaining five justices did not address the issue.) By rejecting the Holloways' arguments in this case, the Texas courts implicitly indicate that at least in the context of claims of this nature, the due process provisions of the Texas Constitution provide the same protection as the Fourteenth Amendment. Whether the Texas courts are correct in their interpretation of Texas law is not a matter for this Court.

to the Fourteenth Amendment. No claim of a violation of due process under the Texas Constitution was alleged in the Plaintiffs' First Amended Complaint. Therefore, no such claim was dismissed without prejudice. The attorneys who represented Holloway in *Holloway v. Walker* refiled his pendent state claims – wrongful receivership and negligence and malfeasance by the receiver – in *Navarro v. Starnes* just a few months after *Holloway v. Walker* was dismissed. *Navarro v. Starnes* concluded in December, 1991 when the Lee County district court rendered a summary judgment against Holloway, which he did not appeal.

Moreover, the issue in this case was whether Judge Walker had conspired with the Brownings and their attorney to prevent the Holloways from presenting their defenses in the trial of the 1979 Case. This was the same claim that the Fifth Circuit held Holloway could have and should have presented in *Holloway v. Walker*. *Browning v. Navarro III*, 887 F.2d at 558-62.

The Holloways next claim that *Browning v. Navarro* did not impart *res judicata* because the federal court twice abstained in favor of the Texas state courts and held that no state remedy was foreclosed by its rulings. The Holloways' argument is misleading. The federal court's abstention had nothing to do with this case or the claims which Holloway made a year later in *Browning v. Navarro*. Instead, the federal district court was deciding whether it should resolve the Lee County collateral attacks, *Jaehne v. Starnes* and *Holloway v. Browning*, which Holloway had filed to interfere with the federal district court's orders in *Browning v. Navarro*.

The federal district court found that *Jaehne v. Starnes* involved conflicting title issues and other issues that were largely local in character. The court further noted that persons who were not party to *Browning v. Navarro* were

claiming that they had superior title to property purportedly subject to the Brownings' constructive trust. The federal district court held that its order for Navarro to deliver property subject to the constructive trust to the Special Trustee did " . . . not foreclose any rights of any individuals ***not parties to this action*** who may assert ***superior title*** to or interest in any property." (H.App. I at 57a; emphasis added.) It provided further, "Likewise, if the Trustee or Holloway should subsequently discover any property which is, ***for reasons other than the validity of the state court judgment,*** rightfully that of the Estate or of the debtor, this order does not foreclose litigation to resolve that issue." (*Id.*, emphasis added.) Accordingly, the federal district court abstained from "the resolution of any issues regarding conflicting claims to title to assets subject to a constructive trust by the [1982 Judgment] on the basis of claims other than those adjudicated in this Court by parties to this action." (*Id.* at 57a-58a.) The Lee County cases were remanded to Texas courts. Thus, the federal district court's abstention order did not authorize the Holloways to pursue further litigation attacking the validity of the 1982 Judgment.

The Holloways also refer to the federal court's language in its June 28, 1985 order about not foreclosing any state court claims. That order dealt with the impact of prior rulings the federal district court had made on a contract argument raised by Holloway.

Approximately a year later, in his Motion for Summary Judgment and Declaratory Judgment, Holloway presented for the first time in *Browning v. Navarro* issues identical to those made in this case. The federal district court attempted to conclude *Browning v. Navarro* without addressing Holloway's claims. When Holloway appealed, however, the Fifth Circuit held that he was entitled to have his claims addressed. *Browning v. Navarro II*, 826

F.2d at 345-46. In *Browning v. Navarro III* the Fifth Circuit held that *res judicata* barred Holloway's claims. 887 F.2d at 558-62.

The federal courts did not authorize further attacks by the Holloways on the validity of the 1982 Judgment. To the contrary, in its final judgment the federal district court enjoined the Holloways from attempting to relitigate any issues that were or could have been determined in *Holloway v. Walker* or *Browning v. Navarro*. The only exception was the pendent state claims in *Holloway v. Walker* which were dismissed without prejudice. The Holloways' claims in this suit were not pendent claims in *Holloway v. Walker*. The Fifth Circuit affirmed that injunction. *Browning v. Navarro IV*, 923 F.2d at 377.

VI. The Holloways' Corruption Claims Are Part of Their Abusive Tactics.

The Holloways attempt to entice this Court into granting certiorari by suggesting this Court needs to act to preserve the integrity of the judicial process and therefore our very system of government.

This litigation has been so abusive because Holloway will and has adopted almost any tactic to win. He has not merely filed repetitious lawsuits hoping to relitigate adverse claims – he has filed multiple suits at the same time, attempting to play one court against the other.[12] He

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[12] Holloway filed the bankruptcy cases in 1979 for tactical reasons to interfere with the Brownings' litigation of the original suit in the state courts. When the original case was remanded to the state courts, he speculated on a trial before Judge Walker without objecting to his qualifications under the bankruptcy court's remand order. When he lost, he attacked the jurisdiction of the state courts on his "leash theory" while simultaneously asking the state appellate courts to reverse the

has used other persons, who were not involved in the original *Browning v. Holloway* litigation, as fronts to attack the 1982 Judgment against him.[13] He has threatened

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judgment for him. *Humble Exploration Co. v. Browning*, 677 S.W.2d at 113. When the Fifth Circuit ruled against him in *Browning v. Navarro I*, he wrongfully and purposefully misdesignated a motion in the Texas court of appeals to seek a second rehearing in violation of the Texas Rules of Civil Procedure. *Humble Exploration Co. v. Browning*, 690 S.W.2d at 323.

When the federal district court issued orders in *Browning v. Navarro* to enforce the 1982 Judgment, he sought extraordinary writs from the Texas appellate courts to prohibit compliance with the federal district court's orders. When those courts denied such relief, he filed the Lee County cases to obtain a series of temporary restraining orders to prohibit compliance with the federal district court's order.

[13] Holloway used family members and other cohorts, who had not been parties in the 1979 Case to attack the 1982 Judgment in *Jaehne v. Starnes*, the Emergency Application to the Fifth Circuit in *Holloway v. Walker*, and a RICO suit, styled *Judge Gregory, et al. v. Judge Dee Brown Walker, et al.*, which Holloway as an attorney filed in the federal courts in 1984. (App. A at 2a & 4a; see F.1; *Gregory v. Walker* is identified on the flow chart by the letter "F.") That suit attacked the 1982 Judgment as being the product of Judge Walker's corrupt use of his office in conspiring with the Brownings, their attorneys and others in the 1979 Case. Neither Mr. Gregory, whose first name was "Judge," nor any of the other plaintiffs had been parties to the 1979 Case. They owned various mineral interests which they alleged were adversely affected by the 1982 Judgment. In discovery, the plaintiffs all stated that they had no knowledge to support any of their allegations. The person purportedly with knowledge was Holloway, whose knowledge was claimed to be privileged. *Gregory v. Walker* was dismissed with prejudice in 1985 for failure to comply with the federal district court's pretrial order. (App. A at 2a & 4a, see F.2.)

violence to prevent enforcement of the 1982 Judgment.[14] He has ignored the orders of the courts.[15]

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[14] In the Emergency Application Holloway prepared for the Fifth Circuit he stated that his wife and their daughters "have refused to leave their home, intending to defend it with all force necessary, and having armed themselves." Included in the allegations of irreparable injury was "the danger to the lives of the antagonists." Holloway has continued to threaten violence against even the judges who have been members of the courts which ruled against him in this case. (App. N at 82a-83a.)

[15] When the federal district court ordered Holloway and those in concert with him to vacate the Lee County Farm, he claimed the order did not apply to his wife, Brenda, or their daughters. Therefore, they did not leave. Holloway left, but returned three days later at the "invitation" of his wife. He contended that the federal district court did not order him to stay off the farm.

The federal district court found Holloway in contempt of court. It ordered him to pay the Brownings for the time he or his family occupied the farm in defiance of its order to vacate and imposed a fine to begin if Holloway did not vacate within ten days. Holloway vacated on the last day before having to pay the fine. He has never paid one cent of the amount the federal district court ordered him to pay the Brownings.

Because of the Holloways' vexatious and frivolous litigation, the federal district court permanently enjoined them from attacking the 1982 Judgment in the courts of the United States. Despite that injunction, in a subsequent appeal from the bankruptcy court before the Fifth Circuit, Holloway again attempted to attack the 1982 Judgment as void. Holloway's rationale was that by contending the 1982 Judgment was void, he was not attacking its validity as prohibited by the prior injunction. In a "final act of mercy" the Fifth Circuit did not sanction Holloway but warned him that any further actions in contravention of the finality of the federal litigation would expose him to the full panoply of sanctions available to the court, including imprisonment. *Holloway v. Navarro*, No. 91-1541, Op. at 3. (App. A at 1a & 4a; see B.8 & 9.) Now Holloway again attacks the validity of the 1982 Judgment in a court of the United States by his petition.

Attacking the integrity of judges is only one weapon in Holloway's arsenal of abusive tactics, which he is not shy about using. Holloway has a long history of attacking as corrupt judges who rule against him. After losing a state court case in the early 1970's, he filed a suit in federal court alleging that seven members of the Texas Supreme Court (several of whom later became judges on the Fifth Circuit) had corruptly ruled against his client. *Atchley v. Greenhill*, 373 F.Supp. 512 (S.D. Tex. 1974), *aff'd*, 517 F.2d 692 (5th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S.Ct. 1115, 47 L.Ed.2d 320 (1976). He has also claimed that Judge Irving Goldberg of the Fifth Circuit decided a case wrongfully as part of a personal vendetta against him. (1979 Case Recusal hearing, Vol. II: 31-32.) In the 1979 Case he claimed that the original trial judge, Judge Hugh Snodgrass, was corrupt. (1979 Case Recusal hearing, Vol. I: 332.) Throughout the 14 years of litigation with the Brownings, he has castigated the judges who have ruled against him in other courts. In the first appeal in this case he attempted to recuse the entire 13-member Dallas Court of Appeals as biased against him.

Holloway persists in these tactics to this day. Following the Texas Supreme Court's denial of his application for writ of error, Holloway was arrested on the affidavit of his own attorney for threatening the life of a justice of the Texas Supreme Court. A newspaper article reporting the arrest (App. N at 82a-83a) states that his attorney's affidavit

> quoted Holloway as saying that killing several judges "would teach the public that when the judiciary is corrupt and those members are killed, the public will be better off."

Austin American-Statesman, February 25, 1993, page B-3. The newspaper article reported further that the Texas Department of Public Safety had investigated Holloway in the summer of 1992 after he reportedly told a Dallas

attorney that Judge Enoch of the Dallas Court of Appeals should be killed. Judge Enoch was then the Chief Justice of the Dallas Court of Appeals, which had recently affirmed the judgment against them in this case. Holloway purportedly discussed how a person could spray the courtroom with automatic machine-gun fire. The first investigation was closed after he assured the police in a meeting at his attorney's office that he was not serious. Now, however, even his attorney acknowledged in his affidavit that "Holloway has arrived at the place where he must be taken very seriously." (App. N at 83a.)

CONCLUSION

In 1989 the Fifth Circuit concluded its *Browning v. Navarro III* opinion as follows:

> Justice Story once wrote "It is for the public interest and policy to make an end to litigation . . . [so that] suits may not be immortal, while men are mortal." *Ocean Insurance Co. v. Fields*, 18 F.Cas. 532 (C.D.D.Mass.1841) (No. 10,406). Little more need be said.

887 F.2d at 563-64. Earlier in the same year Justice Gonzalez of the Texas Supreme Court expressed his frustration with Holloway's perpetual tactics of initiating another lawsuit or appeal from every legal setback, "¡Ya basta!" Justice Gonzalez interpreted this as "Enough is enough." *Holloway v. Fifth Court of Appeals*, 767 S.W.2d at 685, 686 (Gonzalez, J. dissenting). (Justice Gonzalez dissented from that court's ruling that the court of appeals should not immediately end the litigation in the state courts by issuing a writ of prohibition.)

For these reasons, the Brownings respectfully request this Court to deny the Hollowways' petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

CHART OF *BROWNING v. HOLLOWAY* LITIGATION

LEGEND

A. Browning v. Holloway

1. Filed 9/12/79
2. Judgment 8/26/82
3. Appeal 11/24/82
4. App. Dism'd 7/11/84
5. Dism'l reinstated 3/26/85
6. NRE 7/3/85
7. Reh'g Den. 10/30/85
8. Cert. Den. 3/10/86
9. Reh'g Den. 4/28/86

B. Holloway Bankruptcy

1. Filed 11/19/79
2. Conv. to Chap. 7 10/1/82
3. PSH Objections 5/23/86
4. Bank. Ct. O/R PSH Objections 8/7/86
5. PSH Appeal 8/13/86
6. Stayed Pending BvN 8/29/88
7. Dist. Ct. Affirms 4/19/91
8. 5th Cir. Affirms 1/8/92
9. 5th Cir. Rev. Op. 1/27/92

C. Holloway v. Walker

1. Filed 11/18/82
2. Judgment 4/23/85
3. Emerg. Appl. 1/7/86
4. Emerg. Appl. Den. 3/17/86
5. 5th Cir. Affirms 3/19/86
6. Reh'g Den. 5/30/86

7. Cert. Den. 12/1/86
8. Sanctions 1/27/87

D. Browning v. Navarro

1. Filed 3/2/83
2. Judgment 1/17/84
3. BvN I 10/1/84
4. Part. Jdgmt 4/2/85
5. PSH MSJ & DJ 5/5/86
6. Judgment 5/23/86
7. BvN II 8/26/86
8. BvN III 10/23/89
9. 5th Cir. Reh'g Den. 1/26/90
10. Jdgmt w/Inj. 3/21/90
11. BvN IV 1/30/91

E. In Re: Holloway

1. Filed 3/14/86
2. Denied 3/17/86

F. Gregory v. Walker

1. Filed 5/25/84
2. Dismissed 7/12/85

G. Navarro v. Starnes

1. Filed 6/17/85
2. Judgment 12/9/91

H. Jaehne v. Starnes

1. Filed 6/17/85
2. Order 8/28/85
3. Vacated 10/31/85
4. Dismissed 1/10/86
5. Ct. App Op. 9/23/87

6. Writ Denied 5/11/80
7. Part. Jdgmt & Sev. 4/3/91
8. Am'd Par. Jdgmt & Sev. 4/18/91
9. Jdgmt. (sev. case) 1/6/92
10. Ct. App. Af'm 7/1/92

I. Browning v. Placke

1. Leave to File & Stay 8/28/85
2. Mandamus 10/30/85

J. Holloway v. Starnes

1. Filed 6/16/86
2. Ryan Jdgmt 4/13/88
3. Ct. App. Op. 8/15/89
4. Writ Den. 2/28/90
5. Judgment 1/10/91
6. Ct. App. Af'm 6/30/92
7. Writ Denied 2/10/93
8. Reh'g Den. 3/24/93
9. Pet. for Cert. 6/22/93

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

APPENDIX B

NO. 86-7044-I

PAT S. HOLLOWAY, *ET AL.*	§	IN THE DISTRICT
VS.	§	COURT OF
	§	DALLAS
MICHAEL G. STARNES, *ET AL.*	§	COUNTY, TEXAS
	§	162ND JUDICIAL
	§	DISTRICT

MOTION OF PLAINTIFF PAT S. HOLLOWAY AND INTERVENOR BRENDA HOLLOWAY FOR PARTIAL SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Pat S. Holloway, Plaintiff on behalf of himself and Involuntary Plaintiffs Humble Exploration Company and Sterling Pipeline Company, and his wife Brenda Holloway, intervening herein as a co-plaintiff pursuant to Rule 60, Tex.R.Civ.P. (hereinafter collectively the "Holloways") and submit to the Court their Motion for Partial Summary Judgment pursuant to Rule 166-A, Tex.R.Civ.P.. In support thereof they respectfully show to the Court the following:

I.

THE JUDGMENTS HEREIN ARE VOID

The two purported final judgments dated November 11, 1982 and August 26, 1982 entered by this Court in Cause No. 82-5742-I and No. 79-9623-L, and asserted by Plaintiffs Browning Interests against the Holloways in

Plaintiffs' Second Amended Crossclaim filed July 28, 1986 in Cause No. 82-5742-I, are void as a matter of law and subject to collateral attack herein under the decision of the Supreme Court of Texas in *Browning v. Placke*, 698 S.W.2d 362 (1986) because Judge Walker had "no capacity to act as a court." 698 S.W.2d at 363. Judge Walker had no capacity to act as a court by reason of the following:

1. Judge Walker was "interested" in the case within the meaning of the prohibition contained in Section 11 of Article 5 of the Texas Constitution, and so was disqualified to render the judgments therein which are void. It has been settled Texas law for more than 125 years that any judgment rendered by a Texas judge in a case in which he is constitutionally disqualified is absolutely void and a nullity and so subject to collateral attack, and is not merely voidable and so subject to review only by bill of review. See e.g., *Buckholts Ind. School Dist. v. Glazer*, 632 S.W.2d 146, 148 (Tex. 1982); *Fry v. Tucker*, 146 Tex. 18, 202 S.W.2d 218, 221-2 (1972); *Chambers v. Hodges*, 23 Tex. 104, 112-3 (1859).

2. Judge Walker acted in the capacity of "counsel" for the Browning Interests in the case within the meaning of the prohibition contained in Section 11 of Article 5 of the Texas Constitution, so that he lacked capacity to act also as the Court and his judgments are therefore void. As will be demonstrated by Defendants' brief to be submitted in support hereof, it is not necessary under the Texas cases, in order to violate the constitutional prohibition, that the judge have been counsel *of record* in the case but it suffices for disqualification if he performs *any acts appropriate to that of a counsel in the case.*

3. Judge Walker had no capacity to act as a court by reason of his bias or appearance of bias against Defendant Holloway and in favor of the Browning Interests. This deprived him of the capacity to act as a court and rendered his judgments void under Section 5 of Article 11 of the Texas Constitution as implemented by Canon 3C of the Texas Code of Judicial Conduct, TEX.REV.CIV. STAT.ANN. art. 320a, title 14, app. B (Vernon 1986). The Supreme Court of Texas has held that Canon 3(C)(1), which requires the judge to disqualify himself in any "proceeding in which his *impartiality might reasonably be questioned,* including . . . instances where (a) he has a personal bias or prejudice concerning a party," *implements* Section 11 of Article 5 of the Texas Constitution requiring disqualification and rendering judgments by disqualified judges void. *McLeod v. Harris,* 582 S.W.2d 772, 774 n.3 (Tex. 1979). The Texas Court of Criminal Appeals sitting *en banc* has held that the standard for determining bias for purposes of voiding judgments is that the "movant must show that if a reasonable man knew of all the circumstances, *he would harbor doubt about the judge's impartiality.*" *McLenan v. State,* 661 S.W.2d 108, 109 (Tex.Cr. 1983) (*en banc*). Any reasonable person who knew all the circumstances which are shown herein by the uncontrovertible record would at least *harbor a doubt* about Judge Walker's impartiality in the case, and so Movants are entitled to their partial summary judgment as a matter of law. On April 4, 1986, the United States Court of Appeals for the Fifth Circuit held void on collateral attack a Texas state court judgment which had been affirmed on appeal where there was a mere *appearance* of bias by the state court judge because in such a case, "in

the eyes of the public the impartiality of justice is shattered" regardless of actual bias. *Bradshaw v. McCotter*, 785 F.2d 1327, 1329 (5th Cir. 1986). And on April 22, 1986 the United States Supreme Court vacated a state court judgment because of the *appearance* of bias of a state court judge regardless of *actual* bias. *Aetna Life Insurance Company v. Lavoie*, ___ S.Ct. ___ (1986). A Judgment entered by a state court judge who is either biased or gives the appearance of bias is void not only under Section 5 of Article 11 of the Texas Construction, but also under Section 19 of Article 1 of the Texas Constitution, the Texas "Due Process" Clause.

* * *

APPENDIX C

No. 86-7704-I

PAT S. HOLLOWAY,	§	IN THE
ET AL.	§	DISTRICT COURT
	§	OF DALLAS
V.	§	COUNTY, TEXAS
MICHAEL G. STARNES,	§	162ND JUDICIAL
ET. AL.	§	DISTRICT

PLAINTIFFS' SIXTH MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs Pat S. Holloway and Brenda J. Holloway, on behalf of themselves and Humble Exploration Company, Inc. (now HECI Exploration Company) ("Humble") and Sterling Pipeline Company ("Sterling") and file this their sixth motion for partial summary judgment that the judgments entered by Judge Walker in *Browning v. Holloway* are void or voidable as a matter of law. In support thereof they respectfully show to the Court the following.

I.

This motion for partial summary judgment is based solely on the ground that Judge Dee Brown Walker acted as *counsel* or *attorney* in connection with the consolidated *Browning-Fairway* lawsuit. Consequently, his judgments entered in *Browning v. Holloway* are void or voidable by virtue of (1) Section 11 of Article V, and Sections 13, 19 and 29 of Article I, of the Texas Constitution, (2) the Due

Process Clause of the Fourteenth Amendment to the United States Constitution, (3) Article 15, *Tex.Civ.Stat.*, and (4) Canon 3(C)(1)(b) of the Texas Code of Judicial Conduct which has been held by the Supreme Court of Texas to implement the Texas Constitution. Attached hereto and made a part hereof in the Appendix hereto are official public documents, part of the record in the case. They evidence undeniable acts of Judge Walker as "counsel" which make his judgments void or voidable.

* * *

APPENDIX D

(Seal)

05-91-00571-CV
TRANSCRIPT

NO. 86-07704-I

VOLUME I

In the District Court, 162nd Judicial District Court of Texas, begun and holden within and for the County of Dallas and the State of Texas before the Honorable Judge thereof presiding.

PAT S. HOLLOWAY, ET AL — PLAINTIFF

VS.

MICHAEL G. STARNES, ET AL — DEFENDANT

APPEALED TO THE COURT OF APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS, AT DALLAS.

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APPEAL BONDS FILED: APRIL 5, 1991
APRIL 5, 1991
APRIL 10, 1991

(3) $50.00 FILING FEES DUE

NO. 86-7704-I

PAT HOLLOWAY, ET AL	()	IN THE 162ND JUDICIAL
VS.	()	DISTRICT COURT OF
MICHAEL STARNES, ET AL	()	DALLAS COUNTY, TEXAS

* * *

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APPENDIX E

NO. 05-91-00571-CV

IN THE
COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

PAT S. HOLLOWAY — APPELLANT

v.

MICHAEL G. STARNES, Individually, and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDREN'S TRUSTS and as Special Trustee; JANE H. BROWNING, Individually and as Co-Independent Executrix and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING VAUGHN — APPELLEES

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* * *

POINTS OF ERROR

Point of Error 1

The trial court erred by granting Appellees' Amended Motion for Summary Judgment. TR X: 2426-2428.

Point of Error 2

The trial court erred by denying Appellants' Amended Third Motion for Partial Summary Judgment. TR X: 2426-2428.

Point of Error 3

The trial court erred in denying Appellant's First Motion for Partial Summary Judgment because former Judge Dee Brown Walker was constitutionally disqualified by virtue of (1) his interest, (2) his acts as counsel in

the case and (3) his bias amounting to denial of state, as well as federal, due process. TR X: 2426-2428.

Point of Error 4

The trial court erred in denying Appellant's Sixth Motion for Partial Summary Judgment because Judge Walker engaged in acts as counsel in the browning [sic] case, so that his judgment is void. TR X: 2426-2428.

Point of Error 5

The trial court erred by denying Appellant's motion to supplement the summary judgment record with the findings of fact and conclusions of law entered by the Bankruptcy Court on the bankruptcy claim. TR X: 2425.

Point of Error 6

The trial court erred by permanently enjoining Appellant Pat S. Holloway from further litigation or challenge in the courts of this state to the validity of the judgment in the 1979 case. TR X: 2426-2428.

ARGUMENT

Point of Error 1

The trial court erred in granting Appellees' Amended Motion for Summary Judgment.

> The state court judgment, . . . , may involve more than $100,000,000, and we suppose, would pretty much wipe out Holloway if enforced. Yet

> for various reasons he has never had consideration, by either the federal or state courts, of the merits of his colorable claim that the state court judgment resulted from the corrupt abuse of the judicial process.

Browning v. Navarro, 826 F.2d 335, 337 (5th Cir. 1987) (*"Browning II"*). Four years after that analysis, it is still the case that Appellant Pat S. Holloway (hereinafter "Appellant" or "Holloway") has never had consideration of the merits of that colorable claim, now presented in the bill of review foreclosed by the trial court's judgment in this cause.

Whatever the merits of Appellees' underlying claim in the 1979 case, on which they received judgment in 1982, it defies equity and justice to grant that judgment repose when there exists an undetermined claim that the judgment was obtained through corrupt abuse of the judicial process which deprived Holloway of the opportunity to litigate on the merits. Holloway's present claim for equitable relief from that judgment, in the court which rendered that judgment, could not have been heard by any federal court, and the issues material to resolution of the bill of review have *never* been determined by any court in a manner essential to a final judgment. The trial court's conclusion that this bill of review was precluded by prior litigation is therefore erroneous.

* * *

Res Judicata Effect of Federal Litigation

The Supreme Court of Texas has determined that the res judicata effect of federal litigation on subsequent litigation in the courts of this State is governed by federal

rules for the application of res judicata. *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985). The Fifth Circuit has adopted the Restatement (Second) of Judgments as authoritative and controlling on questions of res judicata, *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983), thus the Restatement is the primary source of reference for resolution of the res judicata issues presented in this case by the related federal litigation between Holloway and Appellees. As an initial matter, there is no question that the claims for relief presented by Holloway in this bill of review arise out of the same common nucleus of operative fact as the claims and defenses asserted in the related federal litigation, such that in Restatement terms this case and the federal litigation involve the same transaction or cause of action. *See* JUDGMENTS 2d § 24.

The Restatement distinguishes between the issues of claim preclusion, more traditionally referred to as res judicata, and issue preclusion, a/k/a/ collateral estoppel. Compare JUDGMENTS 2d §§ 25 and 27. The two forms of preclusion have different rules for their application and different effects upon the case considered, and therefore require different perspectives of analysis in any one particular case.

A. Claim Preclusion

The general rule of claim preclusion is that all claims for relief based on the same cause of action must be brought at the same time, and those which are not brought at that time are subsequently barred by the judgment in the initial proceeding. JUDGMENTS 2d §§ 24, 25.

That rule is qualified, however, when there is some jurisdictional or procedural barrier to the assertion of all of the claims in the same proceeding; in that case the subsequent claims which could not have been brought in the initial proceeding are not barred by the judgment. JUDGMENTS 2d § 25, Comment (e); JUDGMENTS 2d § 26(1)(c) and Comment (c)(1) thereto. See also *Jeanes v. Henderson*, 688 S.W.2d at 104 ("Here, we must ascertain the consequences of the subsequent assertion of omitted state-related claims from a federal court action," and citing § 25, comment (e) of JUDGMENTS 2d).

In Texas, a bill of review is an equitable claim for relief which can only be brought in the court which rendered the judgment that the bill of review seeks to vacate. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). No other court, state or federal, can grant the relief requested by the bill except the court which rendered the judgment. It is thus apparent that the claim asserted by Holloway's petition for bill of review could not have been brought in any of the related federal litigation, and consequently the judgments in those proceedings cannot bar the bill of review.

It does not matter, as Appellees have urged, that the United States District Court, sitting in bankruptcy, could have granted relief in the civil rights case which would have provided a similar effect to that afforded by a bill of review; the Restatement speaks in terms of whether the *claim* which the moving party seeks to preclude *could* have been brought in the prior proceeding, not whether similar relief could have been afforded on a different claim which was or could have been brought. There are many reasons why a Federal court might decline to grant

relief on a properly presented federal claim to vacate a state judgment, but that Federal court has no authority, no jurisdiction, to act in any fashion on a state bill of review which also seeks to vacate that state judgment. The purpose behind the Restatement position on claim preclusion is to require a litigant to present all the claims which a particular court has the authority to decide, or else forego their subsequent assertion before a different tribunal. The Restatement does not require the useless act of presenting a claim without jurisdictional basis just so that particular court will determine that it does not have jurisdiction and dismiss the claim on that basis.

It is therefore of no moment that the Fifth Circuit determined that Holloway's federal bankruptcy defense to the enforceability of the judgment in the 1979 case could have been presented at the same time he filed his complaint in the civil rights case alleging a conspiracy to deprive him of his civil rights, so that the defense of fraud in the bankruptcy case was barred by the judgment in the civil rights case. Even if the bankruptcy defense would have afforded the same sort of relief in that case as a bill of review would afford in this case, the claim for relief carried by a bill of review could not have been presented and would not have been heard at that time, (TR VIII: 2078) and therefore it is not precluded by any of the judgments in the federal proceedings. To the extent the trial court's summary judgment relied upon any perceived claim preclusive effect of those proceedings, it is in error and should be reversed.

* * *

Point of Error 3

The trial court erred in denying Appellant's First Motion for Partial Summary Judgment because former Judge Dee Brown Walker was constitutionally disqualified by virtue of (1) his interest, (2) his acts as counsel in the case and (3) his bias amounting to denial of state, as well as federal, due process.

Point of Error 4

The trial court erred in denying Appellant's Sixth Motion for Partial Summary Judgment because Judge Walker engaged in acts as counsel in the browning [sic] **case, so that his judgment is void.**

Appellant's first and sixth motions for summary judgment asserted that the presiding judge of 162nd District was disqualified to hear the 1979 case due to (1) his pecuniary and personal interest in the case, (2) his acts as "counsel in the case" and (3) his bias, all in violation of Section 11 of Article V of the Texas Constitution as implemented by Canon 3(C)(1) of the Texas Code of Judicial Conduct as it existed in 1982, and the Due Process Clause of the Texas as well as of the federal, constitution. TR I: 10; II: 412. In support of these motions Holloway filed: (1) the depositions of Judge Walker and others taken in the civil rights case; (2) a verified transcript of an unlawful agreement between Judge Walker, Jane Browning, Michael Starnes, their Receiver and Robbie Holloway which was never made a part of the record in the 1979 case; (3) the official record in the 1979 case; and (4) ten supporting affidavits not controverted in any way by any of the Appellees, their attorneys, the receiver in the 1979 case,

or the receiver's attorney or accountant. These motions were denied by the trial court when it rendered summary judgment on Appellees' Amended Motion. TR X: 2427.

* * *

Discussion and Authorities

A. General Principles.

If Judge Walker was constitutionally disqualified, his judgment in the Browning Case was "absolutely void". *Fry v. Tucker,* 146 Tex. 18, 202 S.W.2d 218, 221 (1947); *Buckholtz Ind. School Dist. v. Glazer,* 632 S.W.2d 146, 148 (Tex. 1982). A judgment rendered by a disqualified judge is void and subject to collateral attack because he has "no capacity to act as a court." *Browning v. Placke,* 698 S.W.2d 362, 363 (Tex. 1985). It is "wholly unnecessary to appeal from a void judgment," because it "may be disregarded anywhere at any time". *Fulton v. Finch,* 162 Tex. 351, 346 S.W.2d 823, 827 (1961). Even a failure to attempt to appeal does not waive the disqualification issue. *Ex Parte Miller,* 696 S.W.2d 908, 910 (Tex. Cr. 1985) (en banc).

Therefore, all of the Brownings' arguments against the present suit based on the dismissal of the direct appeal from the Browning Judgment have no bearing on, or relevance to, this point of error asserting the disqualification of Judge Walker. Furthermore, any Browning argument based on the bill of review requirements of lack of fault or proof of a meritorious defense is entirely irrelevant to this point. *Boyd v. Gillman Film Corp.,* 447 S.W.2d 759, 763 (Tex. Civ. App. – 1969, writ ref'd n.r.e.); *Odom v. Odom,* 683 S.W.2d 135, 136 (Tex. App.-San Antonio 1984).

B. Disqualification for Interest.

"It is a settled principle of law that the interest which disqualifies is that interest, however small, which rests upon a direct pecuniary or personal interest in the result of the case presented to the judge or court." *Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex. 1982); See *Sun Oil Company v. Whitaker*, 483 S.W.2d 808, 823 (Tex. 1972) ("pecuniary or personal interest"). Because Section 11 of Article 5 of the Texas Constitution disqualifies a judge from hearing any case in which he "may be interested," Texas courts have repeatedly held that if there be a doubt or question of a judge being "interested", that doubt or question should be resolved in favor of disqualification, as opposed to qualification, of the judge. See *Pahl v. Whatt*, 304 S.W.2d 250, 253 (Tex. Civ. App. – El Paso 1957); *Cotulla State Bank v. Herron*, 202 S.W. 797, 798 (Tex. Civ. App. – San Antonio 1917) (Fly, C.J.).

Judge Walker had an obvious personal and pecuniary interest in paying large sums of money out of the defendant Humble to his personal attorneys and personal accountant who had been, and were currently, performing free legal and accounting services for him. See *United States v. Tunnell*, 638, 67 F.2d 1182 (5th Cir. 1982), where the Fifth Circuit held that furnishing the free services of a prostitute to a Texas judge for favorable treatment constituted actual bribery under the Texas bribery statute requiring a "benefit" be conferred on the judge. Once Judge Walker had made these payments to his "free" personal attorneys and "free" accountant out of Humble through his unlawful receiverships, he had a further obvious personal and pecuniary interest in assuring that they not be required to disgorge the money they had

received by his unlawful orders. A Judgment against Holloway divesting him of his ownership of Humble was the only way to assure that result.

Judge Walker also had an undeniable personal and pecuniary interest in having the lawyer he personally hired in the 1979 case, former Judge Robert H. Hughes, paid out of the funds of the defendant Humble instead of out of his own personal funds. And once Judge Walker did this, he had an obvious personal and pecuniary interest in assuring that Holloway did not regain control of Humble so as to be in a position to seek reimbursement from Judge Walker. A judgment against Holloway divesting him of his ownership of Humble was the only way to assure that result.

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, (1986), the Supreme Court held that the Due Process Clause of the 14th Amendment disqualified a state appellate justice, and rendered his court's judgment invalid, where he stood to benefit indirectly in a separate case of his own involving the same legal issue before his court. The financial benefit to Judge Walker was more direct, more substantial and more obvious than that involved in *Lavoie*. In *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 340 (1968), an arbitrator was held to be constitutionally disqualified because he had a "sporadic" and "irregular" business relationship with one of the parties from which he had derived a financial benefit, even though "there had been no dealings between them for about a year preceding the arbitration." 89 S.Ct. at 338.

In the present case the financially beneficial relationships between Judge Walker and his personal attorney Wright, whom Judge Walker made a party to the case, and his other personal attorneys Kelsoe and Sessions, were ongoing at the very time of trial. In the *Commonwealth* case the Supreme Court noted that there were no claim or evidence of actual bias, fraud or partiality. *Id.* at 339-40, 41. Here there is overwhelming evidence of actual bias and partiality, and indisputable evidence of a fraudulent agreement between Judge Walker and the Brownings. The present case is a much stronger case for disqualification than the Supreme Court held to be sufficient in *Commonwealth*.

In *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1110-12 (5th Cir. 1980), *cert. denied*, 449 U.S. 820 (1980), the Fifth Circuit held that a federal judge was disqualified because he was being represented at the time of trial in unrelated matters, "albeit nominally", by the attorney for one party, and also had a business relationship with that attorney. Here G.H. Kelsoe, the Appellees' chief counsel, the receiver John Wright and his attorney Whitley Sessions were all representing Judge Walker in other unrelated matters and had ongoing business and financial relationships with him. In *Potashnick* there was (1) no indication the attorney was working for the federal judge free of charge, (2) the federal judge had not appointed his personal lawyer as receiver, and (3) the federal judge had not ordered any payments by a party to his personal attorney. Yet the federal judge was still disqualified. *A fortiori*, then Judge Walker was disqualified to hear the 1979 case.

There is no doubt about Judge Walker's constitutional disqualification under the foregoing authorities, especially since any doubt regarding disqualification must be resolved in favor of disqualification to fully maintain the appearance of dispassionate impartiality. The trial court therefore erred by denying Holloway's (First) and Sixth Motions for Partial Summary Judgment, as is further demonstrated by the briefs of Robbie Holloway and Flojo Trading Corporation which Holloway adopts in further support hereof. The judgment of the trial court should therefore be reversed and judgment rendered for Appellant.

* * *

APPENDIX F

NO. 05-91-00571-CV

IN THE COURT OF APPEALS
FOR THE FIFTH JUDICIAL DISTRICT OF TEXAS
AT DALLAS

PAT S. HOLLOWAY, ET AL.,

Appellants,

VS.

MICHAEL G. STARNES, ET AL.,

Appellees.

BRIEF OF APPELLANT ROBBIE HOLLOWAY

ORAL ARGUMENT REQUESTED

Dated: June 10, 1991

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* * *

POINT OF ERROR NO. 1 (TR.X:2426-7)

BECAUSE ROBBIE HOLLOWAY WAS NOT A PARTY TO THE PRIOR PROCEEDINGS CLAIMED TO BAR THIS CASE, THE SUMMARY JUDGMENT AGAINST HER WAS ERRONEOUS.

POINT OF ERROR NO. 2 (TR.X:2427)

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' THIRD AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT ASSERTING THAT THE WALKER JUDGMENT IS VOID AS TO FLOJO TRADING CORPORATION, AND THE WALKER JUDGMENT BEING JOINT AND INDIVISIBLE IS VOID AS TO ALL PARTIES.

POINT OF ERROR NO. 3 (Tr.X:2427)

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' FIRST MOTION FOR SUMMARY JUDGMENT ASSERTING THAT THE WALKER JUDGMENT IS VOID BECAUSE OF THE CONSTITUTIONAL DISQUALIFICATION OF FORMER JUDGE DEE BROWN WALKER FOR INTERESTS, ACTS AS COUNSEL IN THE CASE AND BIAS.

POINT OF ERROR NO. 4 (TR.X:2427)

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' SIXTH MOTION FOR SUMMARY JUDGMENT ASSERTING THAT THE WALKER JUDGMENT WAS VOID BECAUSE OF JUDGE WALKER'S CONSTITUTIONAL DISQUALIFICATION FOR HIS ACTS IN THE NATURE OF COUNSEL IN THE CASE.

ARGUMENT

POINT OF ERROR NO. 1 (Restated)

BECAUSE ROBBIE HOLLOWAY WAS NOT A PARTY TO THE PRIOR PROCEEDINGS CLAIMED TO BAR THIS CASE, THE SUMMARY JUDGMENT AGAINST HER WAS ERRONEOUS

There is no basis in law for the ruling of the district court that the claims of Robbie in this case are barred by res judicata or collateral estoppel. As shown below, res judicata requires a prior proceeding involving the **same parties and the same cause of action.** Collateral estoppel applies only where the **same parties** have actually litigated the **same issue,** and it was **essential** to the prior judgment.

Robbie simply was not a party in most of the prior proceedings claimed to bar the present case. Further, the claims and issues she asserts in the present case were not actually litigated and could not have been litigated, in either of the two prior proceedings in which Robbie was a party, but which did not involve the same cause of action she asserts here.

Statement of Facts

The Brownings' claim that the dismissal without trial of the federal civil rights action of *Pat S. Holloway, et al. v. Dee Brown Walker, et al.* is a res judicata bar to this action. *Tr.IV:900 ¶ 8.* Robbie was not a party in *Holloway v. Walker,* filed in 1982 after Robbie's 1981 divorce from Pat.

* * *

The Brownings claim that the Fifth Circuit judgments in *Browning v. Navarro II* and *Browning v. Navarro III*, and the district court judgment entered after *Browning v. Navarro III*, all serve to bar the present action. *Tr.IV:900 ¶ 8, 900 ¶ C et seq.* Robbie was not a party to any of those judgments. The Fifth Circuit has ruled specifically that Robbie was not a party to its judgment in *Browning v. Navarro II* and so was not a party in that case at any time thereafter. *Browning v. Navarro III* on motion for rehearing, 894 F.2d 99, 100 (5th Cir. 1990)

Robbie **was** a party to *Browning v. Navarro I*, and so is bound by the Fifth Circuit judgment there that the Walker Judgment is not void for violation of either the automatic stay of the bankruptcy code or the condition of the federal remand of the Browning Case, requiring its trial before a retired or visiting judge. But Robbie is not attempting to relitigate here that **federal issue.** She concedes it is foreclosed by the Fifth Circuit judgment in *Browning v. Navarro I.* Robbie is asserting here claims under state law as to which the federal court in *Browning v. Navarro* twice *abstained* "in favor of the courts of the State of Texas," ruling expressly that "no state court remedies . . . have been foreclosed by this Court". *Tr.VIIII:2097.* Those federal abstention orders were irrevocable and unreviewable, and were entered in 1985 while Robbie was still a party in that case.

Res judicata applies to the *final* judgment in the prior case. *Restatement (Second) of Judgments § 17 (1982).* The final judgment in *Browning v. Navarro,* and so the only one entitled to **claim** preclusive, res judicata, effect, is the last judgment in that case. That is the January 30, 1991

judgment of the Fifth Circuit, rendered **after** the judgment appealed here. *Browning v. Navarro IV*, 923 F.2d 377 (5th Cir. 1991). That January 30, 1991 judgment of the Fifth Circuit adjudges that "nothing in the district court's judgment or in any of our prior opinions prejudices Mr. Holloway's right to seek an equitable bill of review," although "principles of claim and issue preclusion may bar particular claims or issues" which otherwise might be asserted here. *Id.*

* * *

Discussion of Facts and Authorities

The Fifth Circuit correctly quoted the federal rule of res judicata in *Browning v. Navarro III*, 887 F.2d 553, 558 (5th Cir. 1989):

> **In order for a judgment to serve as a bar to a subsequent action, four conditions must be met: "the parties must be identical in both suits,** the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a **final judgment on the merits, and the same cause of action must be involved in both cases.** (emphasis added)

The Texas rule of res judicata is as follows:

> When a prior judgment is offered in a subsequent suit in which there is **identity of parties, issues and subject matter,** such judgment is treated as an absolute bar to retrial of claims pertaining to the **same cause of action** on the theory that they have merged into the judgment."

Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984) (emphasis added).

Robbie is not precluded from maintaining this action under the federal rule of res judicata because she was not a party in the federal cases relied upon by the Brownings as a res judicata bar to the present action (other than the Fifth Circuit Judgment in *Browning v. Navarro I*, and Robbie concedes that she is precluded from re-litigating here the single **federal** issue adjudicated there). Because Robbie was not a party to any of the state actions which are relied on by the Brownings (other than the dismissed 1981 suit which clearly did not involve the same cause of action), she is not precluded by any state proceeding from maintaining the present action.

Collateral estoppel has no application because Robbie is not seeking to re-litigate here any **issues** actually litigated in any of the prior proceedings in which she was either a party or **a non-party**. *Bacon v. Jordan*, 763 S.W.2d 395, 396 (Tex. 1989); see *Jeanes v. Henderson*, 688 S.W.2d 100, 106 (Tex. 1985).

The issues of extrinsic fraud, collusion and conspiracy have never been actually litigated, either by Robbie or anyone else, in any court, state or federal. Similarly, the issue of Judge Walker's disqualification has not been actually litigated by Robbie or anyone else in any other court, state or federal. Although a motion to recuse was heard, and denied, in the original case, most of the acts relied on to disqualify Judge Walker occurred **after** the recusal hearing. Also, since the direct appeal was dismissed, even those acts committed by Judge Walker

before the recusal hearing which he did not conceal at the time have never been reviewed by an appellate court.

* * *

APPENDIX G

NO. 05-91-00571-CV

IN THE
COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

PAT S. HOLLOWAY

APPELLANT

v.

MICHAEL G. STARNES, Individually and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDREN'S TRUSTS and as Special Trustee; JANE H. BROWNING, Individually and as Co-Independent Executrix and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING VAUGHN

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(Filed July 15, 1992)

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PAT S. HOLLOWAY

NO. 05-91-00571-CV

IN THE
COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
DALLAS, TEXAS

PAT S. HOLLOWAY,

APPELLANT

v.

MICHAEL G. STARNES, Individually and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDREN'S TRUSTS and as Special Trustee; JANE H.

BROWNING, Individually and
as Co-Independent Executrix and
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WILLIAM W. BROWNING, JR.,
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WILLIAM W. BROWNING, JR.,
Deceased; CATHERINE AGNES LAND
STARNES; KATHRYN LOUISE BROWNING
COOK; AVERILLE ADAMS BROWNING;
WILLIAM WEBB BROWNING III;
ROBERT HOLLAND BROWNING;
and WINIFRED FALLON BROWNING VAUGHN,

APPELLEES

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Comes now Appellant PAT S. HOLLOWAY, by and through the undersigned attorneys of record, with this Motion for Rehearing from the judgment of the Court in this cause on June 30, 1992, by which he would show the Court as follows:

GROUND FOR REHEARING

This Court erred in its judgment that Appellant's bill of review is barred by res judicata.

a. Appellant's bill of review could not have been brought in any prior proceeding or action in the federal courts.

On original submission this Court held that Appellant's bill of review was precluded in this cause because Appellant "either made or could have made all of the claims that he now asserts in either the civil rights case or in the enforcement action." **Opinion on Original Submission, p. 15.** This holding conflicts with the applicable federal law which the Court must apply in this cause. **See** *Jeanes v. Henderson*, 688 S.W.2d 100, 103 (Tex. 1985).

In *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983), the Fifth Circuit substantially adopted **Restatement, Second, Judgments (1982)** ("Judgments 2d") as the law of that Circuit concerning the scope of a "claim" for purposes of application of the doctrine of res judicata. § 24, comment (a) of Judgments 2d indicates that a claim embraces "all remedial rights of the plaintiff against the defendant growing out of the relevant transaction" such that the claim is seen in factual terms and is therefore "coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff."

Generally the Restatement forbids the "splitting" of a claim, i.e. all theories and forms of relief arising from a single transaction must be presented in single cause or those not asserted are subsequently precluded. See Judgments 2d § 24(1). However, § 26(c) of Judgments 2d indicates that the general rule against splitting does not apply to a second action when

> The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms or relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; . . .

See and compare Comment (c)(1) to § 26 and Judgments 2d § 25, comment (e).

As this Court is aware, a bill of review such as Appellant's can only be brought in the court which rendered the judgment that the bill seeks to vacate. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). Indeed, the Fifth Circuit has recognized this requirement of Texas jurisprudence, noting that

> . . . The Restatement suggests that actions challenging prior judgments on the basis of fraud should be brought in the court where the judgment was entered. . . . *In Texas, this suggestion is mandatory. The only way to challenge a . . . judgment is to bring a "bill of review" in the original court.*

DuBroff v. DuBroff, 833 F.2d 557, 561 (5th Cir. 1987).

Since Appellant's bill of review is a remedy or form of relief which could not have been presented in either the civil rights case or the enforcement action in the federal courts, it is permissible according to the Restatement and the controlling Federal law for Appellant to seek that remedy and form of relief in this cause. The

Court should therefore grant rehearing and reverse and vacate its judgment on original submission.

b. The Federal court in both the civil rights case and in the enforcement action expressly reserved Appellant's right to seek State remedies in the State courts.

Judgments 2d § 26(1)(b) provides another exception to the general rule prohibiting the splitting of a cause of action when:

> The court in the first action has expressly reserved the plaintiff's right to maintain the second action[.] . . .

That exception should be applied by the Court in this cause because in both the civil rights case and in the enforcement action the Federal courts reserved Appellant's right to seek state remedies in the courts of the State of Texas.

The Civil Rights Case

Appellant's amended complaint in the civil rights case adopted the same factual basis alleged in support of his claim pursuant to 42 U.S.C. § 1983, invoked the pendent jurisdiction of the Federal court to consider his state law causes of action arising out of that common nucleus of operative facts, and prayed for declaratory judgment that the Walker judgment was void. Exhibit 89 to Brownings' Amended Motion for Summary Judgment, pp. 7, 59, 60 and 63. As this Court noted on original submission, that Federal court dismissed Appellant's pendent state

law claims *without prejudice* at the same time that the § 1983 claim was dismissed with prejudice for failure to state a cause of action. In that dismissal, Judge Sanders stated:

> Without expressing an opinion on the merits of the allegations in this case . . . [s]uch claims are better relegated to the normal corrective processes of the state courts. . . .
>
> The court is of the opinion that the viable pendent claims, if any, should be heard in the state courts. . . . No motions addressed to the substance of the pendent claims have been filed or considered by this Court. An adequate state forum is available. . . .
>
> . . . Plaintiffs' claims under 42 U.S.C. § 1983 are DISMISSED WITH PREJUDICE; and Plaintiffs' pendent claims are DISMISSED WITHOUT PREJUDICE to the timely refiling of same in state court.

Exhibit 1 to Plaintiffs' Response to Brownings' Amended Motion for Summary Judgment, p. 7.

In considering a similar situation, and citing to Judgments 2d § 25, Comment (e), the Fifth Circuit stated in *Nilsen v. City of Moss Point* that:

> . . . the rule against splitting causes of action . . . "has no function if the procedural system does not permit the litigant to raise all of those claims in one proceeding." This is sound law. . . . Its soundness is borne out by the illustration given by the panel, that of the refusal of a federal court, in the exercise of its discretion, to exercise jurisdiction over pendent state law claims. Doubtless such claims

> . . . should be held not precluded. This is so because, under the procedural system of the forum, the magistrate either could not or need not have entertained them.

Nilsen, supra, 701 F.2d at 563 (citations omitted). In the terms of Judgments 2d, a dismissal of pendent state claims without prejudice is an express reservation of the right to maintain those claims in a subsequent action such that they will not be precluded if brought in that action. The Court should not, therefore, rely upon the dismissal of the civil rights case to support the Brownings' plea of res judicata in this cause.

The Enforcement Action

Following dismissal of the civil rights case, Judge Sanders was faced in the enforcement action with a state court collateral attack upon the Walker judgment brought by Appellant and others. In response, he entered two abstention orders, stating "[N]o state court remedies for . . . whatever theories may be devised have been foreclosed by this Court," (Exhibit 3 to Plaintiffs' Response to Brownings' Amended Motion for Summary Judgment, p. 4), and "[T]his Court will ABSTAIN in favor of the courts of the State of Texas from the resolution of any issues regarding . . . claims other than those adjudicated in this Court by parties to this action." Exhibit 4 to Plaintiffs' Response to Brownings' Amended Motion for Summary Judgment, pp. 2-3. Thus, again the Federal court expressly reserved Appellant's right to maintain a bill of review in this cause.

An identical issue confronted the Supreme Court in *Jeanes v. Henderson*:

> . . . Here, we must ascertain the consequences of the subsequent assertion of omitted state-related claims from a federal court action. Section 25, comment (e) of [Judgments 2d] instructs a state court to decide: (1) whether the federal court possessed jurisdiction over the omitted state claim, and if so, then (2) whether the federal court would clearly have declined the exercise of that jurisdiction as a matter of discretion. . . .

Jeanes, supra, 688 S.W.2d at 103. As pertinent, comment (e) to § 25 of Judgments 2d states:

> A given claim may find support in theories or grounds arising from both state and federal law. . . . If . . . , the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory of ground should be held not precluded. . . .

In light of this additional explicit reservation of Appellant's right to bring a state law claim for relief in a competent state court, there is no basis for the preclusion of the claim presented in this cause. The Court should therefore grant rehearing and reconsider its opinion on original submission.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant Pat S. Holloway respectfully prays the Court grant rehearing in this cause and upon reconsideration vacate its Judgment of June 30, 1992, and enter judgment as prayed for by Appellant on original submission.

Respectfully submitted,

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APPENDIX H

NO._____

IN
THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

PAT S. HOLLOWAY — PETITIONER

v.

MICHAEL G. STARNES, Individually, and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDREN'S TRUSTS and as Special Trustee; JANE H. BROWNING, Individually and as Co-Independent Executrix and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING VAUGHN

RESPONDENTS

APPLICATION FOR WRIT OF ERROR
TO THE COURT OF APPEALS IN CAUSE NO.
05-91-00571-CV FIFTH SUPREME JUDICIAL DISTRICT

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ATTORNEYS FOR PETITIONER PAT S. HOLLOWAY

NO._____

IN
THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

PAT S. HOLLOWAY — PETITIONER

v.

MICHAEL G. STARNES, Individually, and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDREN'S TRUSTS and as Special Trustee; JANE H. BROWNING, Individually and as Co-Independent Executrix and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING VAUGHN

RESPONDENTS

APPLICATION FOR WRIT OF ERROR
TO THE COURT OF APPEALS IN CAUSE NO.
05-91-00571-CV FIFTH SUPREME JUDICIAL DISTRICT

TO THE SUPREME COURT OF TEXAS:

Now comes Petitioner PAT S. HOLLOWAY, by and through his counsel of record, with this Application for Writ of Error by which he would show the Court as follows:

STATEMENT OF THE CASE

Petitioner Pat S. Holloway ("Holloway") brought suit in Cause No. 86-07704-I seeking a bill of review from a judgment entered in 1982 by Judge Dee Brown Walker in *Jane H. Browning, et al, v. Pat S. Holloway, et al,* Cause No. 79-9623-L/I in the 162nd Judicial District Court of Dallas County ("the Walker Judgment"). On cross motions for summary judgment in this cause, the trial court granted judgment to Respondents and denied Holloway's motions; the Court of Appeals affirmed, holding that Holloway's cause was barred by the application of res judicata and that, therefore, there was no error in the denial of Holloway's motions which had alleged the voidness of the Walker judgment due to Judge Walker's disqualification.

The opinion of the Court of Appeals correctly states the nature and results of the case EXCEPT that the Court of Appeals does not accurately state the rationales of the

decisions of the Fifth Circuit in the related cases of *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987) ("Browning II") and *Browning v. Navarro*, 887 F.2d 553 (5th Cir. 1989) ("Browning III"), and as a result the Court of Appeals overstates the holding of the Fifth Circuit in **Browning III** as " . . . res judicata preclude[s] Holloway's claims that the Walker judgment was procured by fraud." *Holloway v. Starnes*, ___ S.W.2d ___, No. 05-91-571-CV (Tex.App.-Dallas 6/30/92) (slip op. at p. 5). In fact, the Fifth Circuit's holding in **Browning III** is limited by its rationale and the rationale of Browning II such that the only Holloway claim of fraud which has been precluded by the Fifth Circuit is a claim which could only have been brought in a federal district court.

* * *

Thus, the primary question before the Court is whether Holloway's bill of review, based on uncontroverted and admitted allegations which affirmatively demonstrate that the Brownings obtained the Walker judgment through collusion and extrinsic fraud, can be barred by res judicata on the basis of judgments of a federal court which had absolutely no jurisdiction to hear a bill of review.

* * *

POINTS OF ERROR

POINT OF ERROR 1

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT FOR RESPONDENTS BY HOLDING THAT HOLLOWAY'S BILL OF REVIEW IS BARRED BY RES JUDICATA. (TR. X: pp. 2426-2428)

POINT OF ERROR 2

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF HOLLOWAY'S FIRST AND SIXTH MOTIONS FOR SUMMARY JUDGMENT. (TR. X: pp. 2426-2428)

ARGUMENT

POINT OF ERROR 1

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT FOR RESPONDENTS BY HOLDING THAT HOLLOWAY'S BILL OF REVIEW IS BARRED BY RES JUDICATA.

The ultimate decision of the Court of Appeals was to conclude "that Holloway's bill-of-review claims are barred by res judicata and, thus, cannot be asserted in an equitable bill of review." In doing so, the Court of Appeals failed to apply the federal law of res judicata to this cause to determine the preclusive effect of related federal judgments and, therefore, brought itself into conflict with this Court's decision in *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985). Additionally, by its erroneous application of res judicata the decision of the Court of Appeals also conflicts with this Court's decisions in

Browning v. Placke, 698 S.W.2d 362 (Tex. 1985), and *Middleton v. Murff,* 689 S.W.2d 212 (Tex. 1985).

The Court's failure is disturbing in light of its acknowledgement of the presumptive applicability to this cause of **Jeanes** and its further acknowledgement of the controlling principle of res judicata in the Fifth Circuit that "a claim is not barred by res judicata if it could not have been brought." *Browning v. Navarro,* 887 F.2d 553 (5th Cir. 1989) ("Browning III"). Where the Court of Appeals' analysis breaks down is in its overly simplistic conclusion that in the Fifth Circuit

> . . . Res Judicata, however, focuses on whether *claims* were or could have been brought in a prior action. The fact that the federal courts had no jurisdiction to hear Holloway's bill-of-review *proceeding* is irrelevant in determining whether his present *claims* were or could have been brought in a prior federal-court proceeding. If Holloway's present claims either were or could have been asserted in a prior proceeding, res judicata bars this bill of review. . . .

Holloway v. Starnes, ___ S.W.2d ___, No. 05-91-00571-CV (Tex. App.-Dallas 6/30/92) (slip op. at p. 10). This conclusion not only fails to properly comprehend and apply the relevant authority from the Fifth Circuit, it also misperceives the extent and character of the decisions in the Fifth Circuit which the Court of Appeals mistakenly read to require the application of res judicata in this cause.

In order to fully comprehend what the Fifth Circuit intended in **Browning III** when it held that Holloway could not, because of res judicata, advance any further claims for relief in that cause it is necessary to review the

Court's previous decision in that matter, *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987) ("Browning II"). As the Court of Appeals noted, the decisions in **Browning II** and **Browning III** involved an action by the Brownings in the Bankruptcy Court for the Northern District of Texas for the enforcement of the Walker judgment against the Bankruptcy estate of Holloway. In **Browning II** the Fifth Circuit was concerned with allegations raised by Holloway in a motion for summary judgment that the Walker judgment was void because of the actions of the Brownings, their attorneys, and Judge Walker during the trial of the underlying cause; the District Court had summarily dismissed Holloway's motion before any response by the Brownings.

The Fifth Circuit determined that *within the context of the proceeding to enforce the Walker judgment against the bankruptcy estate*, Holloway had one remaining defense which had not been previously determined in the action. That defense was that the judgment in question had been obtained through a corrupt abuse of the judicial process which had operated to deprive Holloway of an opportunity to fairly litigate the issues and which undermined faith in the validity of the jury verdict and resulting judgment. **Browning II**, 826 F.2d at 346. The Court also determined that, within the context of a proceeding to enforce a judgment against the bankruptcy estate, Holloway's ability to assert that defense might be foreclosed by res judicata. *Id.*

In **Browning III** the Fifth Circuit did hold that Holloway's defense to enforcement of the Walker judgment against the bankruptcy estate was barred by res judicata, but what is critical at this stage is that the basis of that

decision was that the Federal District Court which had heard Holloway's civil rights suit was fully competent and authorized to exercise jurisdiction in a bankruptcy matter and therefore to determine whether Holloway had a valid defense to the enforcement of the Walker judgment against his bankruptcy estate. **Browning III,** 887 F.2d at 558-560. In other words, it was the *proceeding* itself which was important to the Fifth Circuit, namely an adversary proceeding within a bankruptcy estate to determine the enforceability of a judgment against that estate, precisely because it was the nature of the proceeding itself which determined whether a particular court had jurisdiction to hear that proceeding and the requests for relief asserted therein. Contrary to the Court of Appeals' blithe dismissal of a lack of jurisdiction as irrelevant to the application of res judicata, the Fifth Circuit law of res judicata is premised upon the existence of subject matter jurisdiction over the claim for relief.

This is supported by the authorities cited by the Fifth Circuit in **Browning III** when it stated that,

> It is black letter law that a claim is not barred by res judicata if it could not have been brought. *If the court rendering judgment lacked subject-matter jurisdiction over a claim or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded.* **RESTATEMENT (SECOND) OF JUDGMENTS** § 26(1)(C). *See also* Nilsen, 701 F.2d at 562-63. . . .

Browning III, 887 F.2d at 558-559 (emphasis added). In *Nilsen v. City of Moss Point,* 701 F.2d 556 (5th Cir. 1983), as cited by the Fifth Circuit in **Browning III,** that Court stated that the rule against splitting a cause of action

> . . . "has no function if *the procedural system* does not permit the litigant to raise all of those claims in one proceeding." *Nilsen II/III*, 674 F.2d at 384 (emphasis added). This is sound law, and we do not gainsay it as a general proposition.

Nilsen, 701 F.2d at 562-563.

§ 26 of the **RESTATEMENT (SECOND) OF JUDGMENTS** ("Restatement"), as cited by the Fifth Circuit in **Browning III,** states:

> (1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) . . .
> (b) . . .
> (c) The plaintiff was unable to rely on a certain theory of the case *or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action,* and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; . . .

(emphasis added). The Commentary to § 26 of the *Restatement* states, as pertinent:

> *c. Where formal barriers existed against full presentation of claim in first action (Subsection (1)(c)).* The general rule of § 24 is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a

litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.

. . .

(l) Limitations on the jurisdiction of a system of courts. A given transaction may result in possible liability under the law of a state and alternatively under a federal statute enforceable exclusively in a federal court. When the plaintiff brings an action in the state court, and judgment is rendered for the defendant, the plaintiff is not barred from an action in the federal court in which he may press his claim against the same defendant under the federal statute. See Illustration 2. Compare § 25(1), Comment *e*.

Comment *e* to § 25 of the *Restatement*, with emphasis added, provides as follows:

e. State and federal theories or grounds. A given claim may find support in theories or ground arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. ***If however, the court in the first action***

> ***would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion), then a second action in a competent court presenting the omitted theory or ground should be held not precluded.***

The opinion of the Court of Appeals acknowledges that the federal courts had no jurisdiction to hear Holloway's bill of review, which if successful results not only in a vacation of the prior judgment but in a retrial as well of the initial, underlying cause of action. Indeed, there is no dispute that the only court which has authority to entertain and dispose of a bill of review is the same court which entered the judgment complained of in the bill. *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985); *Middleton v. Murff*, 689 S.W.2d 212 (Tex. 1985). The decision of the Court of Appeals therefore conflicts not only with the mandate of this Court to apply federal res judicata principles to determine the preclusive effect of federal judgments, but also with this Court's long established jurisprudence that only one court has jurisdiction to hear a petition for bill of review. For those reasons alone, this Court should reverse the judgment of the Dallas Court of Appeals.

Additionally, the Court of Appeals erred in failing to properly apply federal principles of res judicata to the dismissal *without prejudice* of Holloway's pendent state claims in the civil rights action. As a general principal of federal res judicata, the dismissal of pendent state law claims without prejudice does not operate to preclude

reassertion of the claim in a court of competent jurisdiction. See, *Williams v. Dallas County Commissioners*, 689 F.2d 1212, 1215 (5th Cir. 1982) ("Accordingly, dismissal of Williams' . . . claims . . . is without prejudice and would not as a practical matter bar Williams from reasserting such claims . . . "); see also, *Matter of Hallahan*, 936 F.2d 1496, 1499, n. 2 (7th Cir. 1991) ("The case was dismissed without prejudice, and such a dismissal has no *res judicata* effect.")

This is especially so when the claims dismissed by the federal court are pendent state law claims. The exercise of pendent jurisdiction by a federal court is completely a matter of discretion, and to paraphrase Comment *e* to § 25 of the *Restatement*,: [sic]

> . . . . If however, the court in the first action, having jurisdiction to entertain the omitted theory or ground, would clearly have declined to exercise it as a matter of discretion, then a second action in a competent court presenting the omitted theory or ground should be held not precluded.

That, of course, is precisely what the federal court did in Holloway's civil rights case when it dismissed without prejudice Holloway's pendent state law claims which relied upon the same factual allegations made in support of his claim of a deprivation of civil rights and for which Holloway requested declaratory judgment that the Walker judgment was void. In fact, that same court, when called upon to consider the preclusive effect of its dismissal of the civil rights complaint, stated that,

> Furthermore, any state claims that Holloway might have brought in *Holloway v. Walker*

> would have been dismissed without prejudice as were the pendent state claims that he did present in that case.

Exhibit 102 in Support of Amended Motion of the Browning Interests, p. 8 (TR. V: p. 1257). There is, therefore, absolutely no basis to state, as has the Court of Appeals, that the dismissal of Holloway's civil rights complaint and the state claims pendent thereto has or should have any preclusive effect on this cause seeking a bill of review.

With that, any sound or rational basis for the Court of Appeals' reliance on the Fifth Circuit's ruling that Holloway's fraud claim in the enforcement action was barred by res judicata evaporates. It is, however, even more apparent that the Fifth Circuit's sole concern in **Browning II** and **Browning III** was with Holloway's claim for federal relief within the context of the proceeding in his bankruptcy estate to enforce the Walker judgment. The Fifth Circuit could not have contemplated that Holloway's state law remedies for the demonstrably corrupt fashion in which judgment against him was obtained were precluded by those decisions, since to do so would have been in conflict with the circuit's precedent that dismissals without prejudice do not have preclusive effect and that a judgment from a court which has no jurisdiction to consider a particular request for relief does not create a res judicata bar to the subsequent assertion of that request in a court of competent jurisdiction.

There is, then, no basis for the Court of Appeals' decision that Holloway's claim for a bill of review either was or could have been brought in the prior federal litigation. The trial court in the civil rights case expressly

declined to exercise pendent jurisdiction over any state law claim arising out of the Walker judgment, and the Fifth Circuit's application of res judicata in the enforcement action was based upon the availability of jurisdiction for the civil rights court to hear Holloway's request for relief provided by federal bankruptcy law. There was no jurisdiction available for the civil rights court to hear a bill of review premised on state law, including a retrial of the underlying cause, and as such Holloway's claim for relief in this cause could not have been heard at any time by any Federal court. The fact that Holloway's claim has not been heard on the merits has not changed since Judge Jolly's opinion in **Browning II,** wherein he stated:

> The state court judgment . . . may involve more than $100,000,000, and we suppose, would pretty much wipe our [sic] Holloway if enforced. *Yet for various reasons he has never had consideration, by either the federal or state courts, of the merits of his colorable claim that the state court judgment resulted from the corrupt abuse of the judicial process.*
>
> 826 F.2d at 337 (emphasis added). The judgment of the Court of Appeals that res judicata precludes the prosecution of Holloway's bill of review should therefore be reversed.

* * *

APPENDIX I

NO. D-2954

IN THE
SUPREME COURT OF TEXAS

PAT S. HOLLOWAY, et al.,

Petitioners,

v.

MICHAEL G. STARNES, et al.,

Respondents.

On Appeal from the Court of Appeals
for the Fifth Court of Appeals District
of Texas at Dallas, Texas

REPLY BRIEF OF PETITIONER
PAT S. HOLLOWAY

Dated: November 13, 1992

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ATTORNEYS FOR PETITIONER
PAT S. HOLLOWAY

NO. D-2954

IN THE
SUPREME COURT OF TEXAS

PAT S. HOLLOWAY, et al.,

Petitioners,

v.

MICHAEL G. STARNES, et al.,

Respondents.

REPLY BRIEF OF PETITIONER PAT S. HOLLOWAY

TO THE SUPREME COURT OF TEXAS: Petitioner Pat S. Holloway ("Holloway") files this brief in reply to the brief of Respondents Michael G. Starnes, et al. (the "Brownings"), respectfully showing to this Court as follows:

I. The Brownings Mischaracterize Holloway's Position On Res Judicata

On page 22 of the Brownings' brief they say:

> "Holloway's real argument is that *res judicata* does not apply to bill of review proceedings because they are unique to Texas law."

That is **not** Holloway's real argument at all. Of course res judicata applies to bill of review proceedings. A judgment in one bill of review would bar relitigation in a second bill of review of any claims that either were, or could have been, litigated in the first bill of review between the same parties.

But that is not the situation here. Here the federal litigation does not bar litigation of the claims under state law because the federal court (1) in *Holloway v. Walker* dismissed all of Holloway's claims based on Texas law expressly "without prejudice to the timely refiling of same in state court," and (2) in *Browning v. Navarro* "ABSTAINED in favor of the courts of the State of Texas" from deciding any claims of Holloway under Texas law, ruling specifically that "no state court remedies . . . have been foreclosed by this Court."

Because the federal court in both federal cases declined to exercise its discretionary jurisdiction over Holloway's claim insofar as it was based on Texas law, such claim based on Texas law is not barred by res judicata. This is because

> "[i]t is black letter law that a claim is not barred by res judicata if it could not have been brought. If the Court rendering judgment lacked subject

> matter jurisdiction over a claim, or if the procedural rules of the court made it impossible to raise a claim, then it is not precluded. RESTATEMENT (SECOND) OF JUDGMENTS §26(1)(C) *See also Nilsen*, 701 F.2d at 562-63. . . .

Browning v. Navarro III, 887 F.2d at 558-9.

It is the Brownings, not the petitioners here, who are barred and precluded by res judicata (issue preclusion). "Although a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion, it does preclude relitigation of the issues determined in ruling on the jurisdiction question." 18 Wright et al., Federal Practice and Procedure §4436, p.340 (1981). The federal court, in deciding not to exercise its discretionary jurisdiction over the state law claims presented here, determined with preclusive effect the specific issues that no "state court remedies have been foreclosed," that the state law claims "are better relegated to the normal corrective processes of the state courts", and "should be heard in the state courts" and that they were "dismissed without prejudice to the timely refiling thereof in state court". The Brownings are barred by issue preclusion from here asserting the opposite of those binding adjudications made by the federal court in ruling on the jurisdiction question.

II. The Brownings And The Court of Appeals Both Ignore The En Banc Ruling Of The Fifth Circuit In Nilsen v. City of Moss Point., Miss.

The facts of the present case are the precise illustration which the *en banc* Fifth Circuit used as an example of

a situation in which a cause of action or "claim" is not barred even though there is a prior judgment involving the same cause of action or "claim" arising out of the same transaction.

That is the situation presented here, where the federal court itself "split" the single claim or cause of action to set aside the Walker Judgment between its federal law grounds and its state law grounds. The federal court "split" the single cause of action by dismissing without prejudice all of Holloway's claims under Texas law in *Holloway v. Walker*, and by abstaining "in favor of the courts of the State of Texas" with respect to the issues under Texas law sought to be asserted in *Browning v. Navarro*.

In *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556, 562-3 (5th Cir. 1983) (en banc), the Fifth Circuit ruled that the dismissal of pendent state law claims from a civil rights action, the precise situation presented here does not bar the pendent state law claims. The Fifth Circuit stated:

> "[T]he rule against splitting causes of action . . . has no function if the procedural system does not permit the litigant to raise all of those claims in one proceeding [citation omitted] This is sound law. . . . Its soundness is borne out by the illustration given by the panel, that of the refusal of a federal court, in the exercise of its discretion, to exercise jurisdiction over pendent state law claims. Doubtless such claims . . . should be held not precluded. *Id.* This is so because, under the procedural system of the forum, the magistrate either could not or need not have entertained them. *Restatement (Second)*

> *of Judgments* §25, *Comment E.* **Put another way, the rule . . . precluding splitting causes has no function where the court itself, rather than the litigant, does the splitting. . . . "**

III. HOLLOWAY WAS NOT ALLOWED TO RAISE THE STATE LAW DISQUALIFICATION ISSUES IN THE FEDERAL COURT.

The Brownings continue to attempt to mislead the courts when they say on p.26 of their brief:

> "Holloway's pendent state claims in *Holloway v. Walker* were for wrongful receivership and malfeasance by the receiver – not the claims in this case."

The Brownings themselves contradict this erroneous statement when they say elsewhere in their brief:

> "In this case, Holloway not only could have raised the same issues in the federal courts, he did, in fact, raise the very same issues" (p.23).

> "They [Holloway and Robbie] now attempt to relitigate the exact same claims in this combined bill of review and collateral attack." (p.20)

> "Holloway made the same allegations about Judge Walker in *Holloway v. Walker,* contending that such alleged conduct denied him due process." (p.36).

The last statement comes closest to being accurate. Holloway contended that the conduct of Judge Walker denied him due process both under federal law and under state law. The federal court dismissed Holloway's federal due

process claims *with prejudice* as alleging only "procedural" rather than "substantive" due process violations; but it dismissed his state due process claim *without prejudice* to the refiling thereof in state court. This left Holloway's claim for violation of due process under the Texas Constitution free of any bar of res judicata, by virtue of the controlling federal authorities cited above.

In Holloway's amended complaint in *Holloway v. Walker* he "invoke[d] the pendent jurisdiction of this Court to consider [his] state law causes of action which arise out of the same common nucleus of operative facts that have given rise to [his federal §1983 claims]" *Brownings' Amended Motion for Summary Judgment, Vol. I, Ex. 89, P.7* ¶4. In Count Six of this amended complaint, Holloway expressly adopted the same factual allegations (para.1-153 of the complaint) as he had made under the federal §1983 claim in Count One. *Id.*, p.59, ¶185. Under both the federal law and the state law previously invoked, Holloway sought in such Count Six, and prayed for both there and at the end of his complaint, a declaratory judgment that the Walker Judgment was "void". *Id. at p.60, ¶192, and p.63, ¶2.*

In Browning v. Navarro, Judge Barefoot Sanders abstained "in favor of the courts of the State of Texas" when presented with a copy of the plaintiffs' petition in the Lee County collateral attack of *Jaehne, et al. v. Starnes, et al.*, which asserted the claim of Judge Walker's disqualification under the Texas Constitution, which petition has been removed to the federal court, but was then remanded to the state court.

The Holloways were thus precluded by the federal court itself from obtaining any determination of the disqualification issues in the federal courts. Now the court of appeals holds that the Holloways are barred from obtaining such determination in the state courts by the judgments in the federal court. This ruling serves to preserve what the Fifth Circuit characterized as the "corrupt abuse of the judicial process" established by the very same affidavits which neither any of the Brownings nor any of their attorneys have controverted in the present case (or in any other case). *See Browning v. Navarro II*, 826 F.2d 335, 345 (5th Cir. 1987).

* * *

APPENDIX J

NO. D-2954

IN THE
SUPREME COURT OF TEXAS

ROBBIE HOLLOWAY, *ET AL.*,

Petitioners,

v.

MICHAEL G. STARNES, *ET AL.*,

Respondents.

On Appeal from the Court of Appeals
for the Fifth Court of Appeals District
of Texas at Dallas, Texas

REPLY BRIEF OF PETITIONER
ROBBIE HOLLOWAY

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November 10, 1992

* * *

IX. FEDERAL *RES JUDICATA* DOES NOT BAR THIS BILL OF REVIEW/COLLATERAL ATTACK.

The Brownings' response does not confront or discuss any of the federal authorities cited or discussed in Robbie's application or, for that matter, those set forth in the applications of Flojo and Holloway. Those controlling authorities establish very clearly that the present action is not barred by *res judicata*.

As pointed out on p.6 of Robbie's application, and not rebutted in the Brownings' brief, the Dallas Court of Appeals has put the *res judicata* shoe on the wrong foot.

The adjudications by the federal court judgments that "no state court remedies have been foreclosed," that "the parties may proceed in a state court of competent jurisdiction" to litigate their conflicting ownership claims, that "an adequate state court forum is available," that the state law claims "are better relegated to the normal corrective processes of the state courts," "should be heard in the state courts" and are "dismissed without prejudice to the timely refiling of same in state court," are all entitled to preclusive *res judicata* effect in the Texas courts. *Stoll v. Gottlieb*, 305 U.S. 165, 170-1, 59 S.Ct. 134, 137 (1938).

When the federal court in its judgment has adjudicated that "no motions addressed to the substance of the pendent claims have been filed or considered by this Court [*Holloway v. Walker*], and that it "ABSTAINS in favor of the courts of the State of Texas" from adjudicating any state law claims or issues and that "no state court remedies have been foreclosed by this Court" [*Browning v. Navarro*], the state courts are precluded by *res judicata* (issue preclusion) from making a contrary ruling that the

state law claims were adjudicated on their merits in the federal courts, and so are barred and foreclosed.

Furthermore, even apart from principles of *res judicata* and full faith and credit, the Supremacy Clause of the United States Constitution also precludes the state courts from entering judgments in conflict with the above-quoted federal judgments. "Through the Supremacy Clause, Article III provides a sufficient basis for binding state courts." 18 Wright, Miller & Cooper, *Federal Practice & Procedure* §4468, p.649 (1981).

* * *

APPENDIX K

NO. D-2954

IN

THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

****

PAT S. HOLLOWAY, et al.,
PETITIONER

v.

MICHAEL G. STARNES, et al.,
RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR
TO THE COURT OF APPEALS
IN CAUSE NO. 05-91-00571-CV
FIFTH SUPREME JUDICIAL DISTRICT

PETITIONER PAT S. HOLLOWAY'S MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR

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ATTORNEYS FOR PETITIONER PAT S. HOLLOWAY

NO. D-2954

IN

THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

****

PAT S. HOLLOWAY, et al.,
PETITIONER

v.

MICHAEL G. STARNES, et al.,
RESPONDENTS-

ON APPLICATION FOR WRIT OF ERROR
TO THE COURT OF APPEALS
IN CAUSE NO. 05-91-00571-CV
FIFTH SUPREME JUDICIAL DISTRICT

PETITIONER PAT S. HOLLOWAY'S MOTION FOR REHEARING OF APPLICATION FOR WRIT OF ERROR

TO THE SUPREME COURT OF TEXAS:

Comes now Petitioner Pat S. Holloway ("Holloway"), by and through his attorneys of record, with this Motion for Rehearing pursuant to Rule 190 of the Texas Rules of Appellate Procedure, by which he would show the Court as follows:

I.

The denial of Petitioner's Application for Writ of Error conflicts with this Court's opinion in *Jeanes v. Henderson*, (688 S.W. 2d 100), and endorses the Court of Appeals' failure to give federal res judicata effect to the dismissal without prejudice of his pendent state claims in the § 1983 action, specifically his request for judgment that the Walker judgment was void.

In *Jeanes v. Henderson*, 688 S.W.2d 100 (Tex. 1985), this Court stated a requirement that the courts of this state must apply the federal law of res judicata to determine the preclusive effect, if any, of federal cases on the cases before them. A federal court's dismissal *without prejudice* of pendent state law claims over which it has discretionary jurisdiction does not raise a res judicata bar to their subsequent assertion in a state court of competent jurisdiction. *Williams v. Dallas County Commissioners*, 689 F.2d 1212 (5th Cir. 1982).

In the § 1983 action brought by Holloway against Respondents and Judge Dee Brown Walker Holloway invoked the court's pendent jurisdiction to hear state law claims and sought declaratory judgment that the Walker judgment was void. The federal district court, upon its determination that the complaint did not state a cognizable claim for federal relief, dismissed the pendent state claims without prejudice. In spite of that dismissal without prejudice, however, in this case the Dallas Court of Appeals held that Holloway could and should have raised his state claim for relief in the § 1983 action, and that this suit on a bill of review was therefore barred. This is an instance of the Court of Appeals' failure to comply with this Court's mandate in **Jeanes v. Henderson**

to give federal judgments federal res judicata effect. This Court should therefore grant rehearing and set Holloway's application for submission on the merits.

II.

The Court's denial of Petitioner's Application for Writ of Error also conflicts with this Court's opinion in *Jeanes v. Henderson*, and the opinion of the United States Court of Appeals for the Fifth Circuit in *Nilsen v. City of Moss Point*, (701 F.2d 556), in that the opinion of the Dallas Court of Appeals did not apply the federal law of res judicata in determining the preclusive effect of federal judgments.

The opinion of the Dallas Court of Appeals which affirmed the granting of summary judgment against Holloway's bill of review held, essentially, that Holloway could have presented his bill of review in earlier litigation between him and Respondents in the federal court system; based on that determination, the Court of Appeals then held that application of the principles of res judicata precluded further prosecution of the bill of review. In reaching its initial conclusion, the Court of Appeals should have applied the federal law of res judicata to determine the preclusive effect of the prior federal litigation, as this Court required in *Jeanes v. Henderson*, supra, 688 S.W.2d 100. The leading case of the Fifth Circuit concerning the application of res judicata is *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983), yet the Court of Appeals did not apply the principles set out in that opinion.

Citing **Nilsen** and the **RESTATEMENT (SECOND) OF JUDGMENTS**, the Fifth Circuit has held that, "It is

black letter law that a claim is not barred by res judicata if it could not have been brought." *Browning v. Navarro,* 887 F.2d 553 (5th Cir. 1989). There is simply no question that a bill of review pursuant to Texas law cannot be brought in any other court than the court which rendered the judgment challenged by the bill. SEE *Browning v. Placke,* 698 S.W.2d 362 (1985). There was never an opportunity for Holloway to ask the federal courts to hear this bill of review, and there has never existed a legitimate jurisdictional basis for those courts to determine the merits of the bill.

What the Fifth Circuit did say in **Browning v. Navarro,** supra, 887 F.2d 553, and *Browning v. Navarro,* 826 F.2d 335 (5th Cir. 1987), was that Holloway could have requested bankruptcy relief when he asserted his § 1983 claims against Respondents and Judge Dee Brown Walker. But that is not the question presented here or to the Dallas Court of Appeals; the only pertinent question here, as framed by the law of the Fifth Circuit on res judicata, is whether the bill of review could have been presented to those federal courts, i.e., did those courts have jurisdiction to hear a bill of review. The answer to that question is clearly no. The Court of Appeals erred in reaching a contrary result, and this Court should, on rehearing, grant Holloway's application and set it for submission on the merits to properly apply the federal law of res judicata and give the proper effect to the federal judgments.

APPENDIX L

No. 86-271

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 21, 1986

QUESTIONS PRESENTED

1. Where a state trial court has conspired with a litigant to deprive the opposing party of his property in a sham trial, does the availability of a postdeprivation

appeal render the Due Process Clause inapplicable and 42 U.S.C. § 1983 unavailable?

2. In declining to make a federal case of every tort by a state employee, has this Court *sub silentio* overruled a century of precedents holding that official abuse of state authority may violate due process whether or not the state's own system of remedies is constitutionally adequate?

PARTIES TO THE PROCEEDING

The abbreviated caption of this case omits several parties named as defendants in Petitioner Holloway's complaint who are Respondents here: Jane H. Browning, Michael G. Starnes, Catherine Agnes Land Starnes, Kathryn Louise Browning Cook, Averille Adams Browning, William Webb Browning III, Winifred Fallon Browning, Robert Holland Browning and the Estate of William W. Browning, Jr. (the "Browning Interests"); G.H. Kelsoe, Jr. and R. Jack Ayres, Jr. (attorneys for the Browning Interests); John Wright (the receiver appointed by Judge Walker), Whitley R. Sessions, J.R. Hurt Fairway Land Co., Fayette Oil Co., AMCAP Petroleum Associates-1977, AMCAP Petroleum Associates-1979B, American Hawk Oil Co., American Falcon Oil Co., American Eagle Oil Co., American Heron Oil Co., American Wren Oil Co., American Raven Oil Co., Harper Oil Co., Jeffrey Weiss, Donald Ginsberg, and American Petroleum Partners.

APPENDIX M

NO. 85-1182

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

HUMBLE EXPLORATION COMPANY, INC., et al.,
Petitioners,

v.

JANE H. BROWNING, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

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Attorneys for Petitioners

December 24, 1985

I

QUESTIONS PRESENTED

1. Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied when a Texas Court of Appeals dismissed their pending appeal from a judgment rendered against them in the Court of first instance by a biased and corrupted judge following an unfair trial, on the ground that Petitioners forfeited their appeal by unsuccessfully collaterally attacking the validity of that judgment when Respondents sued to enforce it in federal court?

2. Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied by the Texas Court of Appeals' dismissal of Petitioners' appeal on a novel application of the doctrine of election of remedies announced for the first time in their case, which punished Petitioners for exercising their federal constitutional right to defend themselves in the federal court when sued there by Respondents?

3. Whether the Texas Court of Appeals could, without violating the Due Process Clause of the Fourteenth Amendment to the federal Constitution, force Petitioners, who were unable to supersede an $82 million state court judgment rendered against them and were sued in federal court by Respondents to enforce it, to choose between foregoing a defense related to the validity of that judgment or else forfeit their pending appeal.

LIST OF ALL PARTIES

1. Pat S. Holloway

2. Humble Exploration Company, Inc.

3. Sterling Pipeline Company

4. Flojo Trading Corporation

5. Holloway Exploration Corporation

6. Robbie Holloway

7. Jane H. Browning, Individually, and as Co-Independent Executrix of the Estate of William W. Browning, Jr.

8. Michael G. Starnes, Individually, and as Co-Independent Executor of the Estate of William W. Browning, Jr.

9. Kathryn Agnes Land Starnes

10. Kathryn Louise Browning Cook

11. Averille Adams Browning Dawson

12. William Webb Browning, III

13. Winifred Fallon Browning

14. Robert Holland Browning

APPENDIX N

(From the Austin American-Statesman, February 25, 1993, Page B-3)

"LAWYER IS ACCUSED OF THREATS"
"Austinite Holloway held on peace bond"

By Jim Phillips
American-Statesman Staff

An Austin lawyer was in jail in lieu of $1 million bond Wednesday after charges that he threatened to kill several appellate judges.

Pat Sterling Holloway, 61, was arrested late Tuesday at the law offices of Roy Minton, who represents Holloway in a pending civil case.

Holloway was arrested on a peace bond complaint that alleges "he is about to commit an offense against the person of Craig T. Enoch, to wit: murder." Enoch is a justice of the Texas Supreme Court.

The Department of Public Safety first investigated Holloway last summer after he reportedly told a Dallas attorney that Enoch should be killed, according to court affidavits. Enoch at the time was a judge on the 5th Court of Appeals in Dallas.

Holloway is appealing a $72 million judgment assessed against him in 1981. The appeals have been denied by the Dallas appeals court and the Texas Supreme Court.

An affidavit by a DPS lieutenant said that Holloway had discussed how a person could "spray the (Dallas) courtroom with automatic machine-gun fire (and lob) a

rocket through the court's window from the grassy knoll at Dealey Plaza."

The first investigation was closed after Holloway assured police in a meeting at Minton's office that he was not serious.

But Saturday, Holloway again threatened Enoch and other judges during a conversation with Minton about the Supreme Court ruling denying the appeal, according to an affidavit by Minton. In the affidavit, Minton quoted Holloway as saying that killing several judges "would teach the public that when the judiciary is corrupt and those members are killed, the public will be better off."

"It is my studied judgment that Mr. Holloway has arrived at the place where he must be taken very seriously," Minton said in the affidavit.